TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. 4[redacted]155

THE UNITED STATES, PETITIONER,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 21, 1917.
CERTIORARI AND RETURN FILED APRIL 27, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 449.

THE UNITED STATES, PETITIONER,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript of record from the District Court of the United States for the Eastern District of New York	1	1
Summons	1	1
Complaint	2	1
Answer	7	4
Stipulation dated February 28, 1916, waiving jury trial	8	5
Stipulation dated February 28, 1916, in mitigation of penalty	9	5
Agreed statement of facts	11	6
Agreement—Erie Railroad and Brooklyn Eastern District Terminal, May 6, 1907	17	10
Decision	25	14
Judgment	34	20
Notice of exceptions	36	20
Petition for writ of error	38	21
Assignment of errors	39	22
Bond on writ of error	41	23
Writ of error	45	25
Citation	47	26
Stipulation waiving certification	48	27
Clerk's certificate	49	27
Opinion, Hough, J	50	28
Judgment	55	31
Clerk's certificate	56	31
Writ of certiorari and return	58	31

ORIGINAL.

United States Circuit Court of Appeals for the Second Circuit.

BROOKLYN EASTERN DISTRICT TERMINAL, PLAINTIFF IN error (defendant below),
vs.
THE UNITED STATES, DEFENDANT IN ERROR (PLAINTIFF below).

Transcript of record. Error to the District Court of the United States for the Eastern District of New York.

Office of the clerk. Supreme Court U. S. Received Mar. 21, 1917.

United States Circuit Court of Appeals, Second Circuit. William Parkin, clerk. Filed July 14, 1916.

Summons.

United States District Court for the Eastern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Thomas I. Chatfield and VanVechten Veeder, Judges of the District Court of the United States for the Eastern District of New York, at the Borough of Brooklyn, this 7th day of August, in the year one thousand nine hundred and fourteen.

[L. S.] PERCY G. B. GILKES, *Clerk.*
By J. G. COCHRAN, *Deputy Clerk.*

WM. J. YOUNGS, U. S. Atty., Plaintiff's Attorney.

Office and post-office address, Federal Building, Borough of Brooklyn, New York City, New York.

2 *Complaint.*

In the District Court of the United States for the Eastern District of New York. 2513 Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT. } No. ——.

Now comes the United States of America, by William J. Youngs, United States Attorney for the Eastern District of New York, and

brings this action on behalf of the United States against the Brooklyn Eastern District Terminal, a corporation organized and doing business under the laws of the State of New York, and having an office and place *place* of business at Brooklyn, in the State of New York; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said commission.

For a first cause of action,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of New York.

Plaintiff further alleges that in violation of the act of Con-

3 gress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7:00 o'clock a. m., on January 3, 1914, upon its line of railroad in and about Brooklyn, in the State of New York, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: Henry Wilvert, to be and remain on duty for a longer period than sixteen consecutive hours, to-wit: from said hour of 7:00 o'clock a. m., on said date to the hour of 5:00 o'clock a. m., on January 4, 1914.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of defendant's trains, said trains being then and there engaged in the movement of interstate traffic; that during the times mentioned herein, and for some time prior and subsequent thereto, said Henry Wilvert was an employee of the defendant regularly and generally engaged in and connected with the movement of defendant's trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

For a second cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of New York.

Plaintiff further alleges that in violation of the act of Congress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7.00 o'clock

4 a. m., on January 5, 1914, upon its line of road in and about Brooklyn, in the State of New York, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, Henry Wilvert, to be and remain on duty for a longer

period than sixteen consecutive hours, to wit, from said hour of 7.00 o'clock a. m. on said date to the hour of 5.00 o'clock a. m. on January 6, 1914.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of defendant's trains, said trains being then and there engaged in the movement of interstate traffic; that during the times mentioned herein, and for some time prior and subsequent thereto, said Henry Wilvert was an employee of the defendant regularly and generally engaged in and connected with the movement of defendant's trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

For a third cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of New York.

Plaintiff further alleges that in violation of the act of Congress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7.00 o'clock a. m. on October 3, 1913, upon its line of railroad in and about Brooklyn, in the State of New York, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit,

H. D. Becker, to be and remain on duty for a longer period
5 than sixteen consecutive hours, to wit, from said hour of 7.00 o'clock a. m. on said date to the hour of 5.00 o'clock a. m. on October 4, 1913.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of defendant's trains, said trains being then and there engaged in the movement of interstate traffic; that during the times mentioned herein, and for some time prior and subsequent thereto, said H. D. Becker was an employee of the defendant regularly and generally engaged in and connected with the movement of defendant's trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

For a fourth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of New York.

Plaintiff further alleges that in violation of the act of Congress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 7.00 o'clock a. m., on October 14, 1913, upon its line of railroad in and about Brooklyn, in

the State of New York, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, H. D. Becker, to be and remain on duty for a longer period than sixteen consecutive hours, to wit, from said hour of 7.00 o'clock a. m., on said date to the hour of 5.00 o'clock a. m., on October 15, 1913.

Plaintiff further alleges that said employee, while required
6 and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of defendant's trains, said trains being then and there engaged in the movement of interstate traffic; that during the times mentioned herein, and for some time prior and subsequent thereto, said H. D. Becker was an employee of the defendant regularly and generally engaged in and connected with the movement of defendant's trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of two thousand dollars and its costs herein expended.

(Signed) WM. J. YOUNGS,
United States Attorney.

(Endorsed)—Filed August 7, 1914.

7 *Answer.*

United States District Court for the Eastern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

The defendant, by Parsons, Closson & McIlvaine, answers the complaint, and each of the four causes of action therein stated, as follows:

The defendant denies that it is or was at any time a common carrier or engaged in interstate commerce by railroad, or that it has or operates any line of railroad or trains or has violated any act of Congress.

Wherefore the defendant prays judgment that the complaint be dismissed.

PARSONS, CLOSSON & McILVAINE,
Attorneys for Defendants,
52 William Street,
Borough of Manhattan,
The City of New York, N. Y.

STATE OF NEW YORK,
County of New York, } *ss:*

E. C. Potter, jr., being duly sworn, deposes and says that he is vice president of Brooklyn Eastern District Terminal, the defendant

named in the foregoing answer; that he has read the said an-
8 swer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

E. C. POTTER, Jr.

Sworn to before me this 27th day of August, 1914.

[SEAL.] F. H. MACROBERT,
Notary Public, New York County, No. 2558;
New York Register No. 5202.

(Endorsed:) Filed Sept. 9, 1914.

Stipulation dated February 28, 1916, waiving jury trial.

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

It is hereby stipulated and agreed that a trial of this action by jury be waived, and that all questions of law and fact herein be decided by the court.

Dated, February 28th, 1916.

MELVILLE J. FRANCE,
Attorney for Plaintiff.
PARSONS, CLOSSON & MCILVAINE,
Attorneys for Defendant.

(Endorsed:) Filed March 6, 1916.

9 *Stipulation dated February 28, 1916, in mitigation of penalty.*

In the District Court of the United States for the Eastern District of New York.

THE UNITED STATES OF AMERICA

against

THE BROOKLYN EASTERN DISTRICT TERMINAL.

In the event that the court shall determine that the defendant has violated the Federal hours-of-service act, it is hereby stipulated that the following facts respecting the overtime employment of the defendant's employees, Wilvert and Becker, may be taken into consideration by the court in mitigation of the amount of penalty to be imposed:

1. It is the desire of the consignees at the Brooklyn Eastern District Terminal to receive their perishable freight in the early morning hours, so that it may be delivered fresh for the markets in that part of Brooklyn. It is the practice of most consignees of fresh meat to

obtain delivery of their meats during the night from two or three o'clock in the morning on; this to insure early delivery. With a shortage of men in the terminal yards, it would be impossible to make these deliveries, as the cars must be pulled off floats and placed, the whole operation requiring a good deal of switching, and the consequence would be that those dependent upon the early delivery of their supplies would be without them and could not furnish them to the consumers in that vicinity.

10 2. On January 3, 1914, and January 5, 1914, at six o'clock in the afternoon, when the night crews employed by the defendant reported for duty, a conductor regularly employed by the defendant to report for duty at that hour failed to report. The defendant had had no notice that he would not report. Thereupon, upon each of such occasions the said Wilvert, who had been on duty during the day, was asked whether he desired to work that night, and was told that he would receive his regular rate of pay for the extra time if he did. He was not ordered to work, but it was left entirely to his own wishes, and he elected to work.

3. On October 3, 1913, and October 14, 1913, at six o'clock in the afternoon, when the night crews employed by the defendant reported for duty, a brakeman regularly employed by the defendant to report for duty at that hour failed to report. The defendant had had no notice that he would not report. Thereupon, upon each of such occasions, the said Becker, who had been on duty during the day, was asked whether he desired to work that night, and was told that he would receive his regular rate of pay for the extra time if he did. He was not ordered to work, but it was left entirely to his own wishes, and he elected to work.

Dated, Brooklyn, February 28, 1916.

MELVILLE J. FRANCE,
U. S. Attorney & Attorney for Plaintiff.
PARSONS, CLOSSEN & MCILVAINE,
Attys. for Defendant.

(Endorsed:) Filed March 6, 1916.

11 *Agreed statement of facts.*

In the District Court of the United States for the Eastern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT. } No. 73.

Agreed statement of facts.

Now come the plaintiff and the defendant in the above numbered and styled cause, by their respective attorneys, and in order to facilitate the trial of the same enter into the following agreement:

This cause may heard and determined by the court, a jury being hereby expressly waived, and a stipulation to that effect has been duly filed with the clerk of this court.

The following facts, which are agreed to be true in all particulars, may be considered as all the material facts at any trial of this cause, the same as though oral testimony or documentary evidence had been introduced to prove such facts, and the calling of witnesses and the introduction of documentary evidence to prove the same are hereby expressly waived:

1. At all the times in the complaint alleged, the defendant,
12 the Brooklyn Eastern District Terminal, was a navigation corporation, with an authorized capital stock of one hundred thousand dollars ($100,000), incorporated under section 10 of Article III of the transportation corporations law of the State of New York, which reads as follows:

"Seven or more persons may become a corporation for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating, or owning steam, sail, or other boats, ships, vessels or other property, to be used in any lawful business, trade, commerce, or navigation upon the ocean or any seas, sounds, lakes, rivers, canals, or other waterways, and for the carriage, transportation, or storing of lading, freight, mails, property, or passengers thereon."

In its certificate of incorporation, filed on or about June 21, 1906, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. As lessee of Havemeyers & Elder, defendant operates, under contracts a representative one of which is hereto annexed between itself and ten interstate railroads and certain steamship lines entering the port of New York, a union freight terminal station, situated in the Borough of Brooklyn, of the city of New York, between the East River on the west, Kent and Wythe Avenues on the east, North 10th Street on the north, and North 3rd Street on the south, shown
13 on the map hereto annexed, marked Exhibit A; and in connection therewith a fleet of five tugs, thirteen car floats (with carrying capacity varying from ten to seventeen freight cars each), and six lighters. As a part of the equipment of said union terminal station, defendant hires and operates eight standard gauge switching locomotives, all operating between defendant's float bridges which lead from the bulkhead to the floats and its various loading platforms, sheds, warehouses, and coal pockets, shown on said map, and also to its team tracks, all located within a radius of approximately 1/4 mile. The track shown on said map in red is about one mile in length and is a track connecting the various dock and delivery tracks, kept clear for the operation of switching engines. The said

connecting track and various other tracks shown on said map aggregate about 8 1/3 miles in length.

3. Defendant receives from said railroads entering and having their termini in New York City and Jersey City, both carload and less-than-carload freight, destined to Brooklyn, and transports same from said termini to its Brooklyn docks, where the cars containing such freight are hauled from the car floats by said steam locomotives and placed either on the team tracks for delivery to consignees or at the freight houses for unloading.

4. Defendant also receives from shippers both carload and less-than-carload outgoing freight, originating at Brooklyn and destined and consigned to points upon the various railroads outside the State of New York. The same is then switched and loaded by said steam locomotives upon said floats and transported by the defendant's tugs to the docks of the various receiving railroads.

5. The length of the haul effected by defendant's locomotives in moving cars between defendant's float bridges and warehouses,
14 platforms, pockets, etc., varies from a few yards to nearly a mile. The number of cars so hauled as a part of one movement varies from a single car to seven or eight cars. As an incident of such movements, the defendant's locomotives hauling a car or cars have occasion to cross, and do cross, a public street in Brooklyn upon which there are street surface railway tracks, as shown on said map, over which street cars carrying passengers are operated. Such crossings are protected by gates on each side of the tracks; and before crossing such street the locomotive comes to a stop and remains at a stop until the gates are down.

6. Defendant also transports or transfers freight by lighters between the docks of said steamship lines entering New York City, with which it has contracts as above stated, and defendant's Brooklyn docks.

7. For its services in handling freight as above set forth defendant is paid not by the shipper or the consignee, but by the railroad or steamship company upon whose account the transportation service is performed at the rate of 3 cents per 100 pounds on freight moving to or from points east of the western termini of said railroads, and 4-1/5 cents per 100 pounds on freight moving to or from points beyond such termini. Defendant upon prepaid shipments from shippers not on the credit lists of the railroads collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place when such charges have not been prepaid. The freight moneys and charges so received by defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

15 8. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks.

For the use of such cars defendant pays no charges; and except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

9. In connecion with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer, and two or more brakemen.

10. Defendant does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs, or copies of contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. Defendant's terminal at Brooklyn is designated by such railroads and rail and water lines in the tariffs filed by them with the Interstate Commerce Commission as one of their receiving and delivering stations for freight in the Port of New York; and through bills of lading to such terminal as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn, bills of lading of the railroad or steamship line to which the freight is to be delivered are there issued to the shipper by one of the defendant's employees, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

11. Except under the circumstances herein described, de-
16 fendant transports no freight, either by railroad or by water, under any common control, management, or arrangement with any common carrier for a continuous carriage or shipment.

12. In connection with the work of switching cars between defendant's floats and its warehouses and various tracks, as heretofore described, defendant in each case under the circumstances and for the reasons detailed in the stipulation of even date and submitted to the court herewith (which reasons and circumstances are not, however, pleaded or submitted in bar of this action) permitted the employees named in plaintiff's complaint to be and remain on duty for the periods and at the times therein alleged. Defendant's said employees were members of switching crews, and while so engaged in such work on the days mentioned in said complaint were connected with and employed in the movement and switching, over defendant's tracks, of cars containing freight destined to or shipped from both interstate and intrastate points.

Dated Brooklyn, Feb. 28, 1916.

MELVILLE J. FRANCE,
U. S. Attorney & Attorney for Plaintiff.
PARSONS, CLOSSON & MCILVAINE,
Attorneys for Defendant.

(Endorsed.) Filed March 6, 1916.

17 *Agreement—Erie Railroad and Brooklyn Eastern District Terminal.*

This agreement, made this sixth day of May, A. D. one thousand nine hundred and seven, between the Brooklyn Eastern District Terminal, of the city of New York (hereinafter called the "Terminal Company"), party of the first part, and the Erie Railroad Company (hereinafter called the "Railroad Company"), party of the second part:

Whereas the Terminal Company is the lessee of certain premises situated in the city of New York, Borough of Brooklyn, Eastern District, fronting on the East River between North Fifth and North Sixth Streets, and extending back to within one hundred and fifty (150) feet of Berry Street, upon which are warehouses, main tracks and sidings, float bridges and approaches, with other appurtenances suitable for the reception and delivery of freights, sugars, cooperage materials, etc., for carriage between said premises and the freight station of the Railroad Company at present located at Jersey City; and

Whereas the Terminal Company is also lessee of certain premises situated in the said Borough of Brooklyn, Eastern District, fronting on the East River between North Ninth and North Tenth Streets, on which are hay warehouses, grain elevators, warehouses, main tracks and sidings, float bridges and appurtenances suitable for the reception and delivery of freight as contemplated under this contract; and

Whereas the railroad of the Railroad Company runs to its said freight station at Jersey City, and the Railroad Company desires to avail itself of the facilities of the Terminal Company for the

18 purpose of transferring its freight in both directions between said premises in Brooklyn and the freight station aforesaid:

Now this agreement witnesseth:

First. The Terminal Company will put and maintain in good order the premises aforesaid in the Borough of Brooklyn for the reception and delivery of freights hereunder, and will provide and maintain floats, tugs, docks, float bridges and approaches adequate at all times to receive, transfer, and deliver freights loaded or to be loaded in cars under this contract, and sufficient to accommodate the amount of business hereunder contemplated.

Second. The Terminal Company will receive at Jersey City float bridges of the Railroad Company in cars placed on its floats all freight intended for delivery at its premises aforesaid, and will safely carry and deliver same as consigned, and as well will receive at its said premises and load into cars, under the rules of the Railroad Company, and safely carry and deliver the freights loaded upon its floats to the Railroad Company at the Jersey City float bridges.

Third. The responsibility of the Terminal Company for eastwardly bound cars and property therein shall begin when the same are properly loaded and secured upon its floats at said Jersey City float bridges of the Railroad Company and the floats released from said bridges, and shall continue in respect to cars until they have been

returned by it loaded or empty, and in respect to the property contained in eastwardly bound cars, its responsibility shall continue until its actual delivery and acceptance by consignee at Brooklyn.

Fourth. The responsibility of the Terminal Company of all property to be transported westbound shall begin from the time the same is received from the consignor, or consignors, thereof, at its premises aforesaid, and shall continue until the same, loaded into cars, shall have been brought to the float bridges of the Railroad Company at Jersey City in readiness to be attached thereto.

Fifth. The said responsibility of the Terminal Company for the safety of all cars and freight shall be absolute and unqualified, without any exception or exemption whatever, without regard to the cause or occasion of the loss or damage, if any, and without regard to the degree of care or want of care exercised by the Terminal Company, and shall be enforceable by the Railroad Company, or others, as their interest shall appear, for the full amount of the loss or damage sustained.

Sixth. The Terminal Company will provide and keep at its own expense upon its said premises a competent person to be satisfactory to the Railroad Company, to superintend the business hereunder contemplated and to carry out the directions of the Railroad Company as to loading cars, such person to have authority, subject to current instructions from the Railroad Company, to issue bills of lading of the Railroad Company for westbound freights received upon said premises for transportation under this contract, provided, however, that the Terminal Company hereby assumes all risk of and becomes responsible, as hereinbefore provided, to the Railroad Company or others, as interest may appear, for all westbound freight so received, until the same shall have been loaded into cars and delivered at the float bridges of the Railroad Company at Jersey City aforesaid.

Seventh. The Terminal Company will become responsible for and pay to the Railroad Company all freight moneys and charges as set forth in the freight bills rendered by the Railroad Company for the transportation of eastbound freights, and in like manner will be responsible for and pay to the Railroad Company all freight moneys and charges which may have been made payable in advance on westbound freights, all of which payments shall be turned over to the Railroad Company in accordance with the latter's customary rules; and, if so required, a bond with surety satisfactory to the Railroad Company shall be furnished by the Terminal Company.

Eighth. The Terminal Company will insure and keep insured against loss or damage by fire and marine risks all freights, cars, or property received by it upon its floats or upon said premises under this contract, so long as said freights, cars, or property shall remain in its possession and until delivered to consignees or to the Railroad Company for transportation as hereinbefore provided, including the time such freight, cars, or property shall be upon its lighterage line, and such insurance shall be for the benefit of the Railroad Company

and others as their interests shall appear, and to an amount and in such manner as will be satisfactory to the Railroad Company.

Ninth. In cases of eastbound freight consigned to other stations of the Railroad Company in New York Harbor not billed "Lighterage Free" where destination is changed to the premises of the Terminal Company, the Terminal Company shall at the request of the Railroad Company collect from the consignee or forwarder the sum of three cents per hundred pounds, and pay the same over to the Railroad Company, which said three cents per hundred pounds shall be allowed and paid to the Terminal Company as full compensation for all services performed in such cases.

Tenth. Said Terminal Company will furnish said Railroad Company with a complete and accurate copy of each and all con-
21 tracts made by it with other railroad companies during the term of this contract, and the Erie Railroad Company shall have and enjoy, during the life of this contract, all rights and privileges granted to any other railroad by said Terminal Company upon as favorable terms, with respect to allowances or otherwise, as granted to any other railroad company, anything herein to the contrary notwithstanding.

Eleventh. It is further understood and agreed that within the limits of the city of Williamsburgh, so called, extending from Wallabout Bay on the south of Newton Creek on the north, not inclusive of either, the said Railroad Company, unless legally compelled to do so, will not, during the continuance of this contract, establish or maintain any freight stations nor within said limits receive on barges, lighters, floats, or other water craft, for transportation over the line of its railroad to western points hereinafter mentioned, any freights except as provided for in this contract, and that it will not deliver on barges, lighters, floats, or other water craft at any points within the limits hereinbefore described, unless legally compelled to do so, any freight received or transported eastwardly over the railroad of the Railroad Company in any other manner than as provided for in this contract, and that in case of any breach of this provision the Terminal Company may recover from the said Railroad Company, and it shall pay to it at the rate of three (3) dollars for each carload, averaged at 20,000 lbs., received, delivered, or transported contrary to this provision, except that in the event of the disability of the Terminal Company through strikes, lockouts, fire, etc., not being able to handle the traffic of the Railroad Company promptly as offered, the Railroad Company shall have the privilege of making delivery of freight by barge or float within the limits above named during such disability of the Terminal Company.

22 Twelfth. The Railroad Company will maintain all necessary tracks, float bridges, and approaches at its said Jersey City station for the purpose of the business hereunder contemplated, and will take away from said float bridges in Jersey City in regular turn all the westbound freight intended for transportation over the railroad of the Railroad Company and its connections, and deliver

to the floats of the Terminal Company all the eastbound freight consigned to or intended for delivery at the terminal of the Terminal Company.

Thirteenth. The Railroad Company hereby agrees to provide sufficient cars at all times, unavoidable delays excepted, and to supply all railroad books, blanks, and stationery necessary for the purposes of the business to be carried on under this contract, and with all reasonable despatch to receive and take away from the freight station at Jersey City aforesaid all the westbound freight intended for transportation over said Erie Railroad and its connections.

Fourteenth. The Railroad Company shall pay the Terminal Company in full for all its services under this contract, as well as full compensation for all responsibility to be undertaken by it in respect to cars and freight as follows:

(a) For all freight, except coal and coke, transported over the Erie Railroad which shall have been received from its connecting rail or water lines west of the western termini of the Trunk Lines, on through rates, or for freight received by the Terminal Company at its aforesaid premises and destined for rail or water transportation by the Railroad Company to points west of said western termini, on through rates, excepting grain in bulk, at the rate of four and one-fifth ($4\frac{1}{5}$) cents per hundred pounds.

23 (b) For freight originating at or destined to any of said western termini or points east thereof, or billed to or from said western termini at local rates, three (3) cents per hundred pounds.

(c) For grain in bulk the rate shall be three (3) cents per hundred pounds; it being understood that no grain will be handled under this agreement except that intended for domestic consumption.

(d) It is understood that the western termini referred to above are as follows: Suspension Bridge, Black Rock, Buffalo Junction, Erie, Belleaire, Niagara Falls, Buffalo, Dunkirk, Pittsburgh, Wheeling, Tonawanda, East Buffalo, Salamanca, Allegheny, Parkersburg).

(e) For traffic rated per gross ton, either in the official classification or in commodity tariffs, the allowance to the Terminal Company thereon shall be three (3) cents or four and one-fifth ($4\frac{1}{5}$) cents per one hundred pounds, as the case may be, regardless of the gross ton rating.

(f) If coal and coke are handled under this contract, the terms of and rates for such handling shall be fixed from time to time by special agreement.

(g) All settlements are to be made monthly.

Fifteenth: During the continuance of this contract on eastbound and westbound shipments the same rates of freight shall prevail to and from the premises of the Terminal Company that prevail to and from the regular freight stations of the Railroad Company in New York City.

Sixteenth: This contract shall continue in effect until Dec. 1st, 1916, and thereafter shall terminate by ninety days' notice in writing

given by the Terminal Company, or the Railroad Company, to the other of desire to terminate the same.

24 Seventeenth. This agreement shall be binding upon and enure to the benefit of the parties hereto and their successors and assigns, respectively.

In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

BROOKLYN EASTERN DISTRICT TERMINAL,
By H. O. HAVEMEYER, JR., *Pres.*

Attest:
J. H. MCCAFFERTY, *Secretary.*
[SEAL.]
Approved as to form:
G. F. B., *Vice President and General Solicitor.*
4/19/07.

ERIE RAILROAD COMPANY,
By F. D. UNDERWOOD, *President.*

Attest:
DAVID BOSMAN, *Secretary.*
[SEAL.]
(Endorsed:) Filed March 6, 1916.

25 *Decision.*

At a stated term of the District Court of the United States of America for the Eastern District of New York held at the United States court rooms, in the Borough of Brooklyn, city of New York, on the eighteenth day of March, 1916.

Present: Honorable VanVechten Veeder, district judge.

UNITED STATES OF AMERICA, PLAINTIFF,
against
BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

The issues of fact herein having duly come on for trial before this court on the sixth day of March, 1916, and the plaintiff and defendant having duly waived trial by jury and consented to a trial of all issues of fact herein by the court, and having duly filed a stipulation to that effect in the office of the clerk of this court, and the plaintiff and defendant having agreed as to all facts material to the issues herein, and having by their respective attorneys duly filed in the office of the clerk of this court an agreed statement of such material facts, and having further agreed that in the event that the court shall determine that the defendant has violated the Federal hours-of-service act, certain further facts may be considered by the court in mitigation of the amount of recovery, and having duly filed in the office of

26 clerk of this court an agreed statement of facts set forth in the said agreed statements of facts having been duly submitted to me, and the case having been duly tried before me on the sixth day of March, 1916, without a jury, upon said agreed statements of facts.

Now, after hearing Vine H. Smith, Esq., assistant United States attorney for the eastern district of New York, and Philip J. Doherty, Esq., special assistant to the United States attorney, on behalf of the plaintiff, and Henry B. Closson, Esq., on behalf of the defendant, and due deliberation having been had, I decide, find, and direct as follows:

Findings of fact.

1. At all the times in the complaint alleged the defendant, the Brooklyn Eastern District Terminal, was a navigation corporation, with an authorized capital stock of One hundred thousand ($100,000) dollars, incorporated under section 10 of Article III of the transportation corporations law of the State of New York, which reads as follows:

"Seven or more persons may become a corporation for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating, or owning steam, sail, or other boats, ships, vessels, or other property, to be used in any lawful business, trade, commerce, or navigation upon the ocean or any seas, sounds, lakes, rivers, canals, or other waterways, and for the carriage, transportation, or storing of lading, freight, mails, property, or passengers thereon."

In its certificate of incorporation, filed on or about June 21, 1906, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, character, navigate, and own
27 steam, sail, and other boats, ships, vessels, and other property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor, and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. As lessee of Havemeyers & Elder, defendant operates under contracts between itself and ten interstate railroads and certain steamship lines entering the port of New York, a union freight terminal station, situated in the borough of Brooklyn, of the city of New York, between the East River on the west, Kent and Wythe Avenue on the east, North 10th Street on the north, and North 3rd Street on the south, as shown on the map annexed to the agreed statement of facts first above mentioned and marked Exhibit A; and in connection therewith a fleet of five tugs, thirteen car floats with carrying capacity varying from ten to seventeen freight cars each, and six lighters. As a part of the equipment of said union terminals station, defendant hires and operates eight standard gauge switching locomotives, all operating between defendant's float bridges, which lead from the bulkhead to the floats, and its various loading platforms, sheds, warehouses, and coal pockets, shown on said map, and also to its team tracks, all located within a radius of approximately ¼ mile. The track shown on said map in red is about one mile in length and is

a track connecting the various docks and delivery tracks, kept clear from the operation of switching engine. The said connecting track and various other tracks shown on said map aggregate about 8 and $\frac{1}{3}$ miles in length.

3. Defendant received from said railroad entering and having their termini in New York City and Jersey City, both carload and less than carload freight, destined to Brooklyn, and transports
28 same from said termini to its Brooklyn docks, where the cars containing such freight are hauled from the car floats by said steam locomotives and placed either on the team tracks for delivery to consignees or the freight houses for unloading.

4. Defendant also receives from shippers both carload and less than carload outgoing freight, originating at Brooklyn and destined and consigned to points upon the various railroads outside of the State of New York. The same is then switched and loaded by said steam locomotives upon said floats and transported by the defendant's tugs to the docks of the various receiving railroads.

5. The length of the haul effected by defendant's locomotives in moving cars between defendant's float bridges and warehouses, platforms, pockets, etc., varies from a few yards to nearly a mile. The number of cars so hauled as a part of one movement varies from a single car to seven or eight cars. As an incident of such movements the defendant's locomotives hauling a car or cars have occasion to cross and do cross a public street in Brooklyn upon which there are street surface railway tracks, as shown on said map, over which street cars carrying passengers are operated. Such crossings are protected by gates on each side of the tracks; and before crossing such street the locomotive comes to a stop and remains at a stop until the gates are down.

6. Defendant also transports or transfers freight by lighters between the docks of said steamship lines entering New York City, with which it has contracts as above stated, and defendant's Brooklyn docks.

7. For its service in handling freight as above set forth, defendant is paid, not by the shipper or the consignee, but by the railroad or steamship company upon whose account the transportation service is performed, at the rate of 3 cents per 100 pounds on freight
29 moving to or from points east of the western termini of said railroads, and $4\frac{1}{2}$ cents per 100 pounds on freight moving to or from points beyond such termini. Defendant upon prepaid shipments from shippers not on the credit lists of the railroads collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place when such charges have not been prepaid. The freight moneys and charges so received by defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

8. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks. For the use of such cars defendant pays no charges; and, except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

9. In connection with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer, and two or more brakemen.

10. Defendant does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs or copies of contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. Defendant's terminal at Brooklyn is designated by such railroads and rail and water lines in the tariffs filed
30 by them with the Interstate Commerce Commission as one of their receiving and delivering stations for freight in the port of New York, and through bills of lading to such terminals as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn, bills of lading of the railroad or steamship line to which the freight is to be delivered are then issued to the shipper by one of the defendant's employees, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

11. Except under the circumstances herein described, defendant transports no freight, either by a railroad or by water, under any common control, management, or arrangement with any common carrier for a continuous carriage or shipment.

12. In connection with the work of switching cars between defendant's floats and its warehouses and various tracks, as heretofore described, defendant permitted its certain conductor and employee, to wit, Henry Wilvert, to be and remain on duty for a longer period than sixteen consecutive hours, to wit, from the hour of 7.00 o'clock a. m. on January 3, 1914, to the hour of 5.00 o'clock a. m. on January 4, 1914. The said Henry Wilvert was a member of a switching crew, and while so engaged in such work on the said dates was connected with and employed in the movement and switching, over the defendant's tracks, of cars containing freight destined to or shipped from both interstate and intrastate points.

13. In connection with the work of switching cars between defendant's floats and its warehouses and various tracks, as heretofore described, defendant permitted its certain conductor and employee, to wit, Henry Wilvert, to be and remain on duty for a
31 longer period than sixteen consecutive hours, to wit, from the hour of 7.00 o'clock a. m. January 5, 1914, to 5.00 o'clock a. m.

January 6, 1914. The said Henry Wilvert was a member of a switching crew, and while so engaged in such work on the said dates was connected with and employed in the movement and switching, over defendant's tracks, of cars containing freight destined to or shipped from both interstate and intrastate points.

14. In connection with the work of switching cars between defendant's floats and its warehouses and various tracks as heretofore described, defendant permitted its certain brakeman and employee, to wit, H. D. Becker, to be and remain on duty for a longer period than sixteen consecutive hours, to wit, from the hour of 7.00 o'clock a. m. on October 3, 1913, to 5.00 o'clock a. m. on October 4, 1913. The said H. D. Becker was a member of a switching crew, and while so engaged in such work on the said dates was connected with and employed in the movement and switching, over defendant's tracks, of cars containing freight destined to or shipped from both interstate and intrastate points.

15. In connection with the work of switching cars between defendant's floats and its warehouses and various tracks, as heretofore described, defendant permitted its certain brakeman and employee, to wit, H. D. Becker, to be and remain on duty for a longer period than sixteen consecutive hours, to wit, from the hour of 7.00 o'clock a. m. on October 14, 1913, to 5.00 a. m. on October 15, 1913. The said H. D. Becker was a member of a switching crew, and while so engaged in such work on the said dates was connected with and employed in the movement and switching, over defendant's tracks, of cars containing freight destined to or shipped from both interstate and intrastate points.

16. It is the desire of the consignees at the Brooklyn eastern
32 district terminal to receive their perishable freight in the early morning hours, so that it may be delivered from the markets in that part of Brooklyn. It is the practice of most consignees of fresh meat to obtain delivery of their meats during the night from two or three o'clock in the morning on; this to insure early delivery. With a shortage of men in the terminal yards, it would be impossible to make these deliveries, as the cars must be pulled off floats and placed; the whole operation requiring a good deal of switching, and the consequence would be that those dependent upon the early delivery of their supplies would be without them and could not furnish them to the consumers in that vicinity.

17. On January 3, 1914, and January 5, 1914, at six o'clock in the afternoon, when the night crews employed by the defendant reported for duty, a conductor regularly employed by the defendant to report for duty at that hour failed to report. The defendant had had no notice that he would not report. Thereupon, upon each of such occasions, the said Wilvert, who had been on duty during that day, was asked whether he desired to work that night, and was told that he would receive his regular rate of pay for the extra time if he did. He was not ordered to work, but it was left entirely to his own wishes, and he elected to work.

18. On October 3, 1913, and October 14, 1913, at six o'clock in the afternoon, when the night crews employed by the defendant reported for duty, a brakeman regularly employed by the defendant to report for duty at that hour failed to report. The defendant had had no notice that he would not report. Thereupon, upon each of such occasions, the said Becker, who had been on duty during the day, was asked whether he desired to work that night, and was told that he would receive his regular rate of pay for the extra time if he did. He was not ordered to work, but it was left entirely to his own wishes, and he elected to work.

33 *Conclusions of law.*

First. The defendant is, and at all times mentioned in the complaint was, a common carrier within the meaning of the act of Congress of March 4, 1907, commonly known as the hours-of-service act, being 34 Statutes at Large, ch. 2939.

Second. The defendant as such common carrier is, and at all times mentioned in the complaint was, engaged in the transportation of property by railroad from one State or Territory of the United States to other States and Territories of the United States, to wit, from the State of New York to other States and from other States to the State of New York, within the meaning of the said statutes.

Third. The employees of the defendant are, and in particular the employees mentioned in the complaint and the aforegoing findings of fact were on the days and at the times specified in the complaint and in said findings, actually engaged in and connected with the movement of trains within the meaning of said statute.

Fourth. The defendant in permitting its employees, Wilvert and Becker, to be and remain on duty for longer periods than sixteen consecutive hours, as stated in the foregoing findings of fact numbered 12, 13, 14, and 15, violated in each instance the provisions of said statute.

Fifth. The plaintiff is entitled to judgment against the defendant upon each of the four causes of action set forth in the complaint for a penalty as provided by section 3 of the said statute. Upon all the facts found, including those submitted to the court, to be considered as tending to mitigate the amount of any judgment rendered against the defendant herein, the plaintiff is entitled to recover from the defendant a penalty of twenty-five dollars for each of
34 said four violations, and is entitled to judgment against the defendant for the sum of one hundred dollars, with costs.

I accordingly direct judgment for the plaintiff against the defendant for one hundred dollars, with costs, which are hereby awarded to the plaintiff against the defendant to be taxed.

(Sgd.) VANVECHTEN VEEDER,
United States District Judge for the Eastern District of New York.

(Inclosed:) Filed March 18, 1916.

Judgment.

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT. } Judgment.

The issues in this action having been regularly brought on for trial upon an agreed state of facts before Honorable VanVechten Veeder, United States district judge for the Eastern District of New York, on the sixth day of March, nineteen hundred and sixteen, at the United States District Court, Post Office Building, Brooklyn, N. Y., and the respective parties appearing by their attorneys.

And the court having heard the allegations and proofs of
35 the parties, and argument thereon, and, after due deliberation, having duly made and filed its decision on the eighteenth day of March, nineteen hundred and sixteen, containing a statement of the facts found and the conclusions of law thereon, and directing judgment as hereinafter stated and the plaintiff's costs having been duly adjusted at $17.28.

Now, on motion of Melville J. France, Esq., United States attorney for the eastern district of New York, it is,

Adjudged, that the plaintiff, the United States of America, recover of the defendant, Brooklyn Eastern District Terminal, the sum of one hundred ($100) dollars, together with the sum of $17.28 costs as taxed, making in all the sum of one hundred and seventeen and 28/100 ($117.28) dollars.

Dated March 29, 1916.

(Sgd.) PERCY G. B. GILKES, *Clerk.*

By ——— ———,
Deputy Clerk.

(Indorsed:) Filed and entered March 29, 1916.

36 *Notice of exceptions.*

In the District Court of the United States for the Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

Take notice that the defendant, Brooklyn Eastern District Terminal hereby excepts to the decision and findings herein made and filed by the court on the 18th day of March, 1916, as follows:

First. To the first conclusion of law and to every part thereof, and particularly in so far as it finds or decides that the defendant is

or at any time was a common carrier either within the meaning of the act of Congress therein referred to or otherwise.

Second. To the second conclusion of law and to every part thereof, and particularly in so far as it finds or decides that the defendant, either as such common carrier or otherwise, is or at any time was engaged in the transportation of property by railroad from one State or Territory of the United States to any other State or Territory of the United States, or at all, within the meaning of the statutes therein referred to or otherwise.

Third. To the third conclusion of law and to every part
37 thereof, and particularly in so far as it finds or decides that any employee of the defendant is or at any time was engaged in, or connected with, the movement of any train, within the meaning of the statute therein referred to or otherwise.

Fourth. To the fourth conclusion of law and to every part thereof; and particularly in so far as it finds or decides that the defendant, in permitting any employee to be or remain on duty for a longer period than sixteen (16) consecutive hours or otherwise, violated in any instance any provision of the statute therein referred to.

Fifth. To the fifth conclusion of law and to every part thereof; and particularly in so far as it finds or decides that the plaintiff is entitled to any judgment against the defendant upon either of the said four causes of action for any penalty or for any sum.

Sixth. To the direction of any judgment for the plaintiff against the defendant.

Seventh. To the failure of the court upon the facts found by it to direct judgment in favor of the defendant against the plaintiff that the complaint be dismissed upon the merits.

PARSONS, CLOSSON & MCILVAINE,
Attorneys for Brooklyn Eastern District Terminal, Defendant, 32 William Street, New York.

To MELVILLE J. FRANCE, Esq.,
United States Attorney for the Eastern District of New York, and Plaintiff's Attorney.
PERCY G. B. GILKES, *Clerk.*

(Endorsed:) Filed April 29, 1916.

38 *Petition for writ of error.*

In the District Court of the United States for the Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF, against BROOKLYN EASTERN DISTRICT TERMINAL, defendant.	Petition for writ of error.

The Brooklyn Eastern District Terminal, the defendant in the above-entitled cause, feeling itself aggrieved by the decision of the

court herein made and filed on the 18th day of March, 1916, and the judgment thereupon entered on the 29th day of March, 1916, in favor of the plaintiff and against this defendant, for the sum of one hundred and seventeen and 28/100 dollars ($117.28), comes now by Parsons, Closson & McIlvaine, its attorneys, and files herewith its assignment of errors setting out separately and particularly each error asserted and intended to be urged, and petitions the court that an order be made allowing said defendant to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Second Circuit, under the laws of the United States in such case made and provided, and fixing the amount of security which the defendant shall give and furnish upon said writ of error; and that upon the giving of such security all further proceedings in this court
39 be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, May 12th, 1916.

PARSONS, CLOSSON & MCILVAINE,
Attorneys for Defendant,
Office & Post Office Address, No. 52 William Street,
Borough of Manhattan, the City of New York, N. Y.

(Endorsed:) Filed May 15, 1916.

Assignment of errors.

In the District Court of the United States for the Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

The defendant, Brooklyn Eastern District Terminal, hereby assigns the following errors, which it avers occurred upon the trial of this cause and upon which it relies to reverse the judgment entered herein as appears of record:

First. The court erred in finding or deciding in its first conclusion of law that the defendant is or at any time was a common
40 carrier either within the meaning of the act of Congress therein referred to otherwise.

Second. The court erred in finding or deciding in its second conclusion of law that the defendant, either as such common carrier or otherwise, is or at any time was engaged in the transportation of property by railroad from one State or Territory of the United States to any other State or Territory of the United States, or at all, within the meaning of the statutes therein referred to or otherwise.

Third. The court erred in finding or deciding in its third conclusion of law that any employee of the defendant is or at any time was

engaged in or connected with the movement of any train within the meaning of the statute therein referred to or otherwise.

Fourth. The court erred in finding or deciding in its fourth conclusion of law that the defendant, in permitting any employee to be or remain on duty for a longer period than sixteen (16) consecutive hours or otherwise, violated in any instance any provision of the statute therein referred to.

Fifth. The court erred in finding or deciding in its fifth conclusion of law that the plaintiff is entitled to any judgment against the defendant upon either of the said four causes of action for any penalty or for any sum.

Sixth. The court erred in directing judgment for the plaintiff against the defendant.

Seventh. The court erred in failing, upon the facts found by it, to direct judgment in favor of the defendant against the plaintiff that the complaint be dismissed upon the merits.

Wherefore said defendant, plaintiff in error, prays that said
41 judgment may be reversed and final judgment be directed that the complaint be dismissed upon the merits, or, failing that, that a new trial be granted.

PARSONS, CLOSSON & MCILVAINE,
Attorneys for Brooklyn Eastern District Terminal, Defendant, 52 William Street, New York.

(Endorsed:) Filed May 15, 1916.

Bond on appeal.

New York Office, No. 84 William Street.

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

Know all men by these presents, that we, Brooklyn Eastern District Terminal, of 129 Front Street, New York City, N. Y., as principal, and Massachusetts Bonding and Insurance Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having an office and place of business at No. 84 William Street, Borough of Manhattan, city and State of New York,
as surety, are held and firmly bound unto United States of
42 America in the sum of five hundred and 00/100 ($500.00), lawful money of the United States of America, to be paid to the said United States of America, for the payment of which, well and truly to be made, the said Brooklyn Eastern District Terminal and the said Massachusetts Bonding and Insurance Company bind

themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of May, A. D. 1916.

Whereas the above-named Brooklyn Eastern District Terminal has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above-entitled suit by one of the judges of the District Court of the United States for the Eastern District of New York:

Now, therefore, the condition of this obligation is such that if the above-named Brooklyn Eastern District Terminal shall prosecute said writ of error to effect and answer all damages and costs if Brooklyn Eastern District Terminal fails to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

BROOKLYN EASTERN DISTRICT TERMINAL,

[SEAL.] By JOHN H. MCCAFFERTY.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

[SEAL.] By GEORGE E. HAYES, *Assistant Manager.*

Attest:

HARVEY SELF,

Resident Secretary.

STATE OF NEW YORK, *County of New York, ss:*

On this 2nd day of June, 1916, before me personally came John H. McCafferty, to me known, who being by me duly sworn, did
43 depose and say: That he resided in Brooklyn, New York; that he is the secretary of the Brooklyn Eastern District Terminal, the corporation described in and which executed the foregoing instrument. That he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the directors of said corporation; and that he signed his name thereto by like order.

ANDREW WOELFEL,

Notary Public, Richmond County.

Cert. filed in N. Y. Co., No. 214, New York Register No. 8185.

Justification or acknowledgement Federal business. Surety department.

[Vignette.] Massachusetts Bonding and Insurance Company. Home office, Boston, Massachusetts.

STATE OF NEW YORK,

County of New York, City of New York, ss.

Personally appeared before me Harvey Self, on this 29th day of May, one thousand nine hundred and sixteen, known to me to be the resident secretary of Massachusetts Bonding and Insurance Company, the corporation described in and which executed the annexed bond of Brooklyn Eastern District Terminal, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of New York, in the State of New York; that he is the resident secretary of said Massachusetts Bonding and Insurance Company, and knows the corporate seal thereof; that said company is

duly and legally incorporated under the laws of the Commonwealth of Massachusetts; that said company has complied with
44 the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Brooklyn Eastern District Terminal is the corporate seal of said Massachusetts Bonding and Insurance Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as resident secretary of said company; and that he is acquainted with George E. Hayes, and knows him to be the assistant manager of said company; and that the signature of said George E. Hayes subscribed to said bond is in the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of two million ($2,000,000) dollars.

Deponent further says that Philip Walker, residing at Washington, D. C., has been duly appointed as the agent of said company to accept service of process against said company in the judicial district wherein this bond is given and is authorized to enter an appearance in behalf of said company in any action, suit, or proceeding brought against it in said judicial district.

HARVEY SELF.

[SEAL.]

Sworn to, acknowledged before me, and subscribed in my presence this 29th day of May, 1916.

[SEAL.]

ARTHUR H. POOLE,
N. P., etc., Notary Public.

(Endorsed:) Approved as to form and sufficiency of surety. Dated June 6, 1916. Van Vechten Veeder.

(Endorsed:) Filed June 8, 1916.

45 *Writ of error.*

District Court of the United States of America for the Eastern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT. } Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the district court of the United States for the Eastern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you

between United States of America, plaintiff in error, and Brooklyn Eastern District Terminal, defendant in error, a manifest error has happened to the damage of Brooklyn Eastern District Terminal, defendant in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same

46 at the Borough of Manhattan, in the city and State of New York, where said court is sitting, within thirty (30) days from the date hereof, to wit, July 5, 1916, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and the customs of the United States, should be done.

Witness, the Honorable VanVechten Veeder, United States District Judge, eastern district of New York, this 8th day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States, the one hundred and fortieth.

[SEAL.]

PERCY G. B. GILKES,
Clerk of the United States District Court for the Eastern District of New York in the Second Circuit.
By J. G. COCHRAN,
Deputy Clerk.

The foregoing writ is hereby allowed this the 6th day of June, A. D. 1916.

VANVECHTEN VEEDER,
United States District Judge.

(Endorsed:) Filed June 8, 1916.

47 *Citation.*

By the Hon VanVechten Veeder, one of the judges of the district court of the United States for the eastern district of New York, in the Second Circuit.

To UNITED STATES OF AMERICA:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, at the borough of Manhattan, in the city of New York, State of New York, in the district and circuit above named, on the 5th day of July, 1916, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of New York, wherein Brooklyn Eastern District Terminal is the appellant

and you are the respondent, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Brooklyn, in the city of New York, State of New York, in the district and circuit above named, this 6th day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States the one hundred and fortieth.

VANVECHTEN VEEDER,
Judge of the District Court of the United States for the Eastern District of New York in the Second Circuit.

(Endorsed:) Filed June 8, 1916.

48 *Stipulation waiving certification.*

United States District Court, Eastern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated June 23rd, 1916.

MELVILLE J. FRANCE,
United States Attorney for the Eastern District of New York and Attorney for Plaintiff.

PARSONS, CLOSSON & MCILVAINE,
Attorneys for Defendant.

49 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, clerk of the district court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a true copy of the printed transcript of the record on file in this court, as the return to the writ of error of the defendant, in the suit of The United States of America, plaintiff, *versus* Brooklyn Eastern District Terminal, defendant.

In witness whereof I have hereunto set my hand and the seal of this court this 26th day of June, 1916.

[SEAL.] PERCY G. B. GILKES, *Clerk.*
By J. G. COCHRAN, *Deputy Clerk.*

Ten cent Inter. Rev. stamp cancelled.

50 United States Circuit Court of Appeals for the Second Circuit. No. 97, October term, 1916. Argued December 5, 1916. Decided January 9, 1917.

BROOKLYN EASTERN DISTRICT TERMINAL, PLAINTIFF IN ERROR,

v.

UNITED STATES, DEFENDANT IN ERROR.

In error to the District Court of the United States for the Eastern District of New York.

Before Coxe, Rogers, and Hough, circuit judges.

Writ of error to review a judgment of the District Court for the Eastern District of New York, against the defendant below (hereinafter called the Terminal), for penalties incurred by violation of the act of March 4, 1907, commonly called the "hours of service act." The case was tried on an agreed statement of facts, which admitted that the Terminal had permitted several "members of switching crews," at their own request, to remain on duty for more than sixteen consecutive hours.

Henry B. Closson, for plaintiff in error.

Melville J. France, U. S. attorney, for defendant in error.

51 HOUGH, J.: The Terminal is a corporation organized under the transportation corporation law of New York for the purpose (as declared in its certificate of incorporation) of owning and employing vessels and other property in the business of transporting and storing merchandize in New York Harbor and the territory bordering thereon. It maintains a fleet of tugs and car floats, which convey cars to and from its station on the Brooklyn shore of the harbor, procuring and delivering such cars at the depots (mostly on the New Jersey shore) of sundry railroads, e. g., the Erie. Its own Brooklyn station contains float bridges, platforms, freight sheds, &c., all connected by railroad tracks, and does not apparently differ from many other water-front freight yards in construction and arrangements. In order to haul the cars so handled from and to the bridges and places of loading and delivery it hires several switching engines, which take "drags" of cars, i. e., one or more cars fastened to the engine, wherever they are wanted within the terminal limits. It owns no cars and transport no passengers. To manage these "drags," so called "switching crews" are employed by the Terminal, each consisting of a conductor, engineer, and a number of brakemen deemed sufficient.

It thus appears that the only business of the Terminal is to provide for some ten or more interstate railways and certain steamship lines which have no Long Island termini a place for the receipt and delivery of freight, doing the same kind of work which the railroads themselves do at (e. g.) their New Jersey stations.

This work is done in pursuance of identical written contracts with the Terminal's several patrons, under which the Terminal is paid so

much per hundredweight for freight transported, receives and delivers goods in the name of (e. g.) the Erie Railroad, issues the bill of lading of the proper company, and collects freight moneys as agent, turning over all receipts in full to the patrons to which they severally belong.

52 The question presented by this writ is whether the Terminal is subject to the provisions and penalties of the statute invoked by the United States.

The hours of service act is declared by its own preamble to apply to "any common carrier or carriers, their officers, agents, and employees" engaged in interstate or foreign commerce, and "employees" is defined as meaning "persons actually engaged in or connected with the movement of any train."

It is admitted that the Terminal is by the carriage of goods from New Jersey to Long Island engaged in interstate transportation; indeed, that is the staple of its business.

Whether a member of a switching crew is a "person actually engaged in or connected with the movement of any train" depends upon whether the drags of cars handled by these crews are "trains." This word has received construction in cases arising under the safety appliance act, with the result that switching operations have been held not to be "train movement." (United States vs. Erie Railroad, 237 U. S., 402; United States vs. Chicago, &c., 237 U. S., 410. See also La Mere vs. Railway &c. Co., 125 Minn., 159; United States vs. Grand &c. Co., 203 Fed. Rep., 775; Atchison &c. Co. vs. United States, 198 Fed. Rep., 637; United States vs. Burton &c. Co., 168 Fed. Rep., at 153; United States vs. Chicago, Great Western &c. Co., 162 Fed. Rep., 775).

In our recent decision in International &c. Co. vs. United States we pointed out how consistently the safety appliance act had been construed to reach the mischief for which the remedy was provided, and we have no doubt the hours of service statute must receive the same liberal interpretation. A string of connected cars hauled on one track by one or more engines is, in common speech, a train. If it is to be brought within the scope of the safety appliance act during mere switching operations, so that the air brake provision applies, the statute is a nuisance, not even contributing to safety; but men may as easily work beyond the limits of reliability and health on

53 "drags" of cars as on the same number of cars travelling the open road; indeed, we think the work in yards probably more onerous and exacting.

The object of this statute is the preservation of efficiency by keeping the body sound; and, having regard to that legislative purpose, we have no hesitation in holding that the "switching crews" of the Terminal were "engaged in the movement of a train" within the meaning of the statute, although the same collocation of cars and engines would not be within the air brake provision of the safety appliance act when engaged in switching operations only.

This statute, however, applies solely to "common carriers": it is so explicitly stated. That the Terminal is a carrier cannot be doubted, but a common carrier is one who by virtue of his calling undertakes to transport personal property from one place to another for all such as may choose to employ him, and every one who so carries and delivers for compensation the goods of all persons indifferently is a common carrier. (United States vs. Ramsey, 197 Fed. Rep., 144.)

The point is too plain to need elaboration: this plaintiff in error is not a common carrier, for it transports only for those it has contracts with and only such goods as its patrons entrusts to it; it does not carry for "all persons indifferently." It is, however, the agent of several common carriers, employed by them to discharge to the public the duties of common carriage assumed by those railways and steamship companies which hire the Terminal for that purpose. (United States vs. Union Pacific &c. Co., 213 Fed. Rep., 332). The same reasoning which finds the Terminal a common carrier would necessarily apply the same term to every teamster who with his own vehicle collects and delivers goods for (e. g.) an express company under a yearly contract. The test is that shippers and consignees have no contractural relation with the Terminal; they deal with the common carriers as disclosed principals through the Terminal as agent.

There remains the question whether an agent of a common carrier subject to the statute may not be liable to the penalties thereby
54 prescribed. Doubtless this is often the case, for sec. 2 declares it unlawful for the "agents" of any common carrier "subject to this act" to permit any employee subject to this act" to do what the Terminal's switching crew did, and sec. 3 declares "such" agent to be liable to a penalty. But these words necessarily depend for scope and effect on the declaratory preamble, which states that the act applies only to common carriers engaged in the described commerce and their officers, agents, and employees. This limits the word employees to those of a common carrier and does not permit its extension to the servants of an agent which is not itself a common carrier.

Thus if (e. g.) the Erie Railroad switched its own cars in the Terminal's yard with its own crews, those men would be subject to the act, and if the Terminal as the Erie's agent compelled or permitted them to work over time, liability would attach both to Erie and Terminal; but the employees of the Terminal itself are not within statutory language too explicit to admit doubt or require construction. (See Baltimore &c. Co. vs. Interstate &c. Com'n., 221 U. S., at 617.)

Judgment reversed.

55 At a stated term of the United States Circuit Court of Appeals, in and for the second circuit, held at the court rooms

in the post-office building in the city of New York, on the 19th day of January, one thousand nine hundred and seventeen.

Present: Hon. Alfred C. Coxe, Hon. Henry Wade Rogers, Hon. Charles M. Hough, circuit judges.

BROOKLYN EASTERN DISTRICT TERMINAL, PLAINTIFF IN ERROR,

v.

UNITED STATES, DEFENDANT IN ERROR.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said district court be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

56 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Brooklyn Eastern Dist. Terminal v. U. S. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 19, 1917. William Parkin, clerk.

57 UNITED STATES OF AMERICA,
Southern District of New York, ss.

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 56, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Brooklyn Eastern District Terminal against United States as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 1st day of March, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the said United States the one hundred and forty-first.

[SEAL.] WM. PARKIN, *Clerk*.

58 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Brooklyn Eastern District Terminal is plaintiff in error and the United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the

District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 25844. Supreme Court of the United States. No. 1014, October term, 1916. The United States vs. Brooklyn Eastern District Terminal. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 23, 1917. William Parkin, clerk.

59 In the Supreme Court of the United States, October term, 1916.

THE UNITED STATES, PETITIONER,
v.
BROOKLYN EASTERN DISTRICT TERMINAL. } No. 1014.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified transcript of the record herein, now on file in the office of the Clerk of the Supreme Court, may be taken as the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued herein.

JOHN W. DAVIS, *Solicitor General.*
HENRY B. CLOSSON, *Counsel for Respondent.*

April 18, 1917.
File 183449.

60 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, April 23rd, 1917.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

61 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. Brooklyn Eastern Dist. Terminal v. U. S. Return to certiorari. Office of the Clerk Supreme Court U. S. Received Apr. 27, 1917.

62 File No. 25844. Supreme Court U. S., October term, 1916. Term No. 1014. The United States, petitioner vs. Brooklyn Eastern District Terminal. Writ of certiorari and return. Filed April 27, 1917.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
BROOKLYN EASTERN DISTRICT TERMINAL. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT.

PETITION.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled case.

A suit for penalties under the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, was instituted against Brooklyn Eastern District Terminal in the District Court for the Eastern District of New York. The case was heard on an agreed statement of facts. (R. 11). The District Court found for the Government, but the Circuit Court of Appeals for the Second Circuit reversed the judgment. (R. 25–35, 50.)

83952—17

THE FACTS.

Several employees of the defendant, engaged as members of switching crews in the yard of the Terminal, remained on duty more than the statutory period of 16 hours. Both lower courts agreed that these operations were within the scope of the Hours of Service Act if that law is applicable to the defendant. The Circuit Court of Appeals held, however, that the Hours of Service Law does not apply to the defendant, on the ground that the act reaches only "common carriers" and the defendant is not a *common* carrier.

The facts from which the Circuit Court of Appeals concluded the defendant is not a common carrier are stated in its opinion:

> The Terminal is a corporation organized under the Transportation Corporation Law of New York for the purpose (as declared in its certificate of incorporation) of owning and employing vessels and other property in the business of transporting and storing merchandize in New York Harbor and the territory bordering thereon. It maintains a fleet of tugs and carfloats, which convey cars to and from its station on the Brooklyn shore of the harbor, procuring and delivering such cars at the depots (mostly on the New Jersey shore) of sundry railroads, e. g., the Erie. Its own Brooklyn station contains float bridges, platforms, freight sheds, etc., all connected by railroad tracks, and does not apparently differ from many other waterfront freight yards in construction and arrangements. In

order to haul the cars so handled from and to the bridges and places of loading and delivery, it hires several switching engines, which take "drags" of cars, i. e. one or more cars fastened to the engine, wherever they are wanted within the terminal limits. It owns no cars and transports no passengers. To manage these "drags" so-called "switching crews" are employed by the Terminal, each consisting of a conductor, engineer and a number of brakemen deemed sufficient.

It thus appears that the only business of the Terminal is to provide for some 10 or more interstate railways, and certain steamship lines, which have no Long Island termini, a place for the receipt and delivery of freight, doing the same kind of work which the railroads themselves do at (e. g.) their New Jersey stations.

This work is done in pursuance of identical written contracts with the Terminal's several patrons, under which the Terminal is paid so much per hundredweight for freight transported, receives and delivers goods in the name of (e. g.) the Erie Railroad, issues the bill of lading of the proper company, and collects freight moneys as agent, turning over all receipts in full to the patrons to which they severally belong.

It should be added that while the defendant does not hold itself out as ready to perform carriage for the public generally, its facilities are included in published tariffs filed with the Interstate Commerce Commission by the trunk lines.

STATUTE.

The material portion of the Hours of Service Act is as follows:

> The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad * * * from one State * * * to any other State. * * * The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.
>
> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than 16 consecutive hours. * * * (c. 2939, 34 Stat. 1415).

QUESTION PRESENTED.

The question presented is:

Does the Hours of Service Act apply to terminal companies?

REASONS FOR ALLOWANCE OF WRIT.

1. The determination of the question presented is of great importance to the public.

2. The decision of the Circuit Court of Appeals is contrary to principles established by decisions of this court and of the Circuit Courts of Appeals for other circuits.

BRIEF.

I.

IMPORTANCE OF QUESTION INVOLVED.

The decision nullifies the object of the Hours of Service Act with regard to terminal companies, as two excerpts from the opinion of the Circuit Court of Appeals show:

> The object of this statute is the preservation of efficiency by keeping the body sound, * * * but men may as easily work beyond the limits of reliability and health on "drags" of cars, as on the same number of cars travelling the open road; indeed we think the work in yards probably more onerous and exacting.

There are many separately incorporated terminal companies engaged in business similar to that of defendant. The language of the Act to Regulate Commerce, c. 104, 24 Stat. 379, and of other regulatory laws is similar to the language of the Hours of Service Act, being limited in scope to "common carriers"; and this decision would remove such terminal companies from the operation of all these regulatory laws.

II.

UNSOUNDNESS OF DECISION OF CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals that the Terminal is not a common carrier is based on the fact that the Terminal carries only for the railroads and steamship companies and their patrons, not for the public generally.

This fact does not make the Terminal a private carrier. A carrier which limits its profession to defined but important portions of the public is still a common carrier. *Terminal Taxicab Company, Inc.* v. *Kutz*, 241 U. S. 252. It is plain, too, that the Terminal in fact holds itself out through the trunk lines to carry for the public generally.

> And it is of little significance that the Stock Yards Company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroads companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire, a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate. Van Devanter, J., in *Union Stock Yards Co.* v. *United States*, 169 Fed. 404, 406, quoted with approval in *United States* v. *Union Stock Yard and Transit Co.*, 226 U. S. 286, 305.

Other laws confined in scope to "common carriers" apply to terminal companies not distinguishable in

their organization and business from the defendant. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Union Stock Yards Co.* v. *United States*, 169 Fed. 404 (C. C. A. 8th Circuit); cf. *Belt Railway Co. of Chicago* v. *United States*, 168 Fed. 542 (C. C. A. 7th Circuit).

The first-mentioned case involved the applicability of the Act to Regulate Commerce and the Elkins Act, the pertinent language of which is substantially the same as the words of the Hours of Service Act, to the stock yards system at Chicago. This system was composed of a holding company and two operating companies; one operating company performing the function of a railroad stock yard, and the other of a terminal railroad connecting the stock yard and industrial plants with the trunk line and the trunk lines with one another. These operating companies, like the defendant in the present case, were paid by the trunk lines instead of by the public, gave no bills of lading of their own, and received freight and hauled cars for that portion of the public that dealt with the trunk lines rather than for the public generally. This court held both of the operating companies were common carriers subject to the acts.

The conclusion that the Terminal is a common carrier is strengthened by the fact it runs its trains along a public street, a privilege which would be unlawful if it were not a public-service company. While the Terminal's charter does not so far as shown specifically impose the obligations of a public-service

company, the New York law under which it was incorporated seems plainly to contemplate that it shall be a common carrier. General Corporation Law, section 2, Consolidated Laws of New York, Vol. II, c. 23; Transportation Corporations Law, section 10, Consolidated Laws of New York, Vol. V, c. 63.

The argument now advanced by the Terminal is directly at variance with the position heretofore assumed by it before this court. In *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274, the Terminal filed in the District Court a petition for leave to intervene, which was granted. This petition, verified by its president and general manager, stated:

> Your petitioner is a transportation corporation organized under the laws of the State of New York, *engaged as a common carrier in the transportation of property partly by railroad* and partly by water, * * *. [Record *United States* v. *Baltimore & Ohio R. R. Co.*, *supra*, p. 70.]

The defendant made two additional points in the Circuit Court of Appeals, neither of which was sustained. The first point was that the defendant is not a carrier "by railroad." The defendant has in its yard tracks aggregating over 8 miles in length and it operates eight standard locomotive engines, so the term "railroad" literally applies to it. The language of the Hours of Service Act is very broad and, as the court below points out, operations inside terminals are within the evil aimed at. These operations

should not therefore be excluded by a technical construction of this remedial law.

The second point was that the Terminal's employees are not "actually engaged in or connected with the movement of any *trains*," for the Terminal's drags are not trains. The argument is based on the circumstance that some courts have inclined to hold switching operations inside a yard not to be "train" operations within the air-brake provisions of the Safety Appliance Act, c. 196, 27 Stat. 531, because of the delay and danger supposed to be involved in continually making air-brake connections in switching operations. The reason has no force in the present case, since it is even easier to comply with the Hours of Service Act in yard service than in line service. The language of this court, in a case holding switching operations to be "train" operations within the meaning of a State employers' liability act, is pertinent:

> To hold that the operation in the yard of a company, of a train hauled by an engine, for the purpose of distributing its cars is not an operation of a train or engine within the meaning of the Indiana act, and that the negligence of employes directing and controlling the movements of the train is not the negligence of one in charge of a train within the fair purpose and meaning of the act, would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employes. [*Chicago, Indiana & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559, 564].

As the decision of the Circuit Court of Appeals disposed completely of the merits of the case, it is a final judgment for purposes of review.

It is respectfully submitted that a writ of certiorari should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1917.

○

Office Supreme Court, U. S.
FILED
MAR 21 1917
JAMES D. MAHER
CLERK

No. 1014.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA, PETITIONER,

v.

BROOKLYN EASTERN DISTRICT TERMINAL.

BRIEF IN OPPOSITION TO THE PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

The Brooklyn Daily Eagle Job Printing Office, Inc., 184 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner, AGAINST BROOKLYN EASTERN DISTRICT TERMINAL.	October Term 1916

BRIEF IN OPPOSITION TO THE PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

The amount involved in this case is $117.28.

The Government's brief states that the question presented is:

> "Does the Hours of Service Act apply to Terminal Companies."

With great respect to the learned Solicitor General, we are obliged to deny the accuracy of this statement. The only question presented is this:

Is the Brooklyn Eastern District Terminal, under its charter, and its method of doing business only for those carriers with whom it chooses to make contracts, a common carrier?

Upon this point, the Circuit Court of Appeals upheld the Terminal's contention, that it is not a common carrier. The other contentions of the Terminal, being the only ones which might be regarded as involving questions of common concern and public interest, viz.: Whether the switching tracks of such a terminal constitute a "railroad", or whether the drags of cars switched on these tracks constitute "trains", were decided adversely to it, and in accordance with the contention of the Government. The Hours of Service Act was not construed, except in accordance with the Government's own contention of its meaning.

Whether or not the Brooklyn Eastern District Terminal is a common carrier, is a matter of importance to the Terminal, but to no one else. It happens to be a Navigation Corporation, incorporated under the Navigation Chapter of the New York Transportation Corporations Law. There is probably no other terminal company in the country in the same situation. The decision that this Terminal Company is not a common carrier, can in no way affect the status of other terminal companies, incorporated under other acts making them of necessity common carriers, or doing business in other ways giving them that status.

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

H. B. CLOSSON
of Counsel for Brooklyn Eastern
District Terminal.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, PETITIONER,
v.
BROOKLYN EASTERN DISTRICT TERMINAL. } No. 155.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit to recover penalties for alleged violations of the act of March 4, 1907, 34 Stat., c. 2939, p. 1415, known as the hours-of-service act, the material portion of which is as follows:

> That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad * * * from one State * * * to any other State * * *. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated

under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, * * *.

THE PLEADINGS.

The complaint charged four separate violations of the act. The answer was as follows:

> The defendant denies that it is or was at any time a common carrier or engaged in interstate commerce by railroad, or that it has or operates any line of railroad or trains or has violated any act of Congress. (Rec., p. 4.)

QUESTIONS INVOLVED BELOW.

The issues thus made are:

(1) Is defendant engaged in the interstate transportation of passengers or property by railroad?

(2) Is it a common carrier?

(3) Did it require or permit employees "actually engaged in or connected with the movement of any train" to remain on duty for a longer period than 16 consecutive hours?

In the stipulation upon which the case was tried it is admitted that the employees named in the complaint remained on duty for a longer period than 16 hours. It was also admitted that defendant's entire

business consisted of the interstate transportation of freight from points in Brooklyn, N. Y., to Jersey City, N. J., and the case was contested on the second and third issues.

ACTION OF COURTS BELOW.

The District Court rendered a judgment for the penalties. (Rec., pp. 14–20.) The Circuit Court of Appeals reversed the judgment, holding that the employees in question were actually engaged in or connected with the movement of trains but that the defendant is not a common carrier and is not, therefore, subject to the Act. (Rec., pp. 28–30.)

QUESTION NOW INVOLVED.

As stated in the brief in opposition to the petition for certiorari, the only question now in contest is whether defendant is a common carrier.

THE FACTS.

The defendant company was organized as a navigation corporation under the transportation laws of the State of New York, which contain regulatory provisions, such as that certain articles shall be carried for passengers, as baggage, without extra charge, which would be appropriate only in the case of common carriers. (Rec., p. 7; Consolidated Laws of New York, 1909, vol. 5, Chap. 63, Article 3, p. 4615.)

The purposes for which it was formed are stated in its charter to be—

> to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other

> property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon. (Rec., p. 7.)

The local authorities have recognized it as a common carrier or public-service corporation by permitting its tracks to be laid in a public street and to cross street-car tracks at several places.

Since this court takes judicial notice of its own records, it is not improper to state that defendant has heretofore regarded itself as a common carrier. In *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274, it intervened in the District Court and, in its petition, sworn to by its president and signed by the same attorneys who appear for it in this case, said:

> Your petitioner is a transportation corporation organized under the laws of the State of New York, engaged as a common carrier in the transportation of property partly by railroad and partly by water, the transportation by water being performed by your petitioner under arrangements, hereinafter stated in detail, with the railroads who are complainants in this suit, for a continuous carriage or shipment, from one State to another. (Rec., *United States* v. *Baltimore & Ohio Railroad Co.*, No. 385 October Term, 1913, p. 70.)

It holds, under a lease, and operates a union freight terminal station in Brooklyn, which includes float bridges, platforms, freight sheds, etc., together

with about 8¾ miles of railroad track, and does not differ in construction and arrangement from many other water-front freight yards. In connection with these facilities it maintains and operates a fleet of 5 tugs, 13 car floats (with capacity varying from 10 to 17 freight cars each), and 6 lighters, plying between its station on Long Island and the termini of various railroad and steamship companies at Jersey City. It owns or leases no railroad cars, but hires eight standard-gauge locomotives, which it operates over its tracks between its float bridges and its various loading platforms, sheds, warehouses, coal pockets, and team tracks, hauling the cars of other companies and employing for that purpose four to eight crews during the day and two at night, each crew consisting of a conductor, engineer, and two or more brakemen. The length of the haul varies from a few yards to nearly a mile, and the number of cars hauled as a part of one movement from one to seven or eight.

It is thus equipped to transport, by water, freight between Jersey City and its Brooklyn docks, but not to transport it between these docks and the various loading and unloading points controlled by it in Brooklyn and reached by its tracks, except when tendered in cars or when other carriers furnish cars for loading.

On the other hand, there are 10 trunk line railroads and a number of steamship companies handling freight destined to and from Brooklyn which have their termini at Jersey City, but no terminal facilities in Brooklyn.

The situation then was that the railroads had the necessary cars for carrying Brooklyn freight, but no facilities for receiving or delivering it or transporting between Brooklyn and Jersey City, while the defendant had no cars, but did have facilities for transporting it between these two points and the necessary railroad tracks and motive power to reach the places in Brooklyn where it was to be received or delivered. By combining the facilities of both, the continuous transit of freight between Brooklyn and places in other States was accomplished. This was done by contracts, identical in terms, made by defendant with each of the railroad companies. Under these contracts the railroads bring freight destined for Brooklyn to their docks at Jersey City. There the cars containing both carload and less-than-carload freight are delivered to defendant and transported on its floats to its own docks in Brooklyn. There the defendant attaches its locomotives to trains composed of from one to eight cars and hauls them over its railroad tracks to its various team tracks, sheds, and freight houses, where it makes deliveries to the consignees. At these same points it receives from shippers both carload and less-than-carload freight destined for carriage over the various railroads. This is loaded in cars furnished by the railroads and hauled by defendant over its railroad tracks to its docks and thence, by water, transported and delivered to the railroads at their Jersey City docks. Thus the defendant's terminal facilities practically became the Brooklyn depot of the rail-

roads and the defendant performs the part of the transportation between Jersey City and the loading and unloading points in Brooklyn. On all freight so handled and transported it receives 3 cents per hundred pounds for such as moves to or from points on the lines of the railroad companies mentioned, and $4\frac{1}{5}$ cents for that moving to or from points beyond those lines.

Incoming freight is billed through to Brooklyn and shippers delivering freight to defendant receive a brough bill of lading to the point of destination. Defendant, in case of prepayment, collects the freight charges for the entire transportation. It also collects all such charges on incoming freight. (Rec., pp. 6–9.)

Continuous carriage or shipment of freight between points in Brooklyn and points in other States is thus accomplished, a part of the transportation being by defendant and the rest by connecting carriers. Under this arrangement, defendant does not file any tariffs or concurrences in tariffs with the Interstate Commerce Commission. But the railroads with which it does business designate its Brooklyn terminal in rail-and-water lines in the tariffs filed by them with the Interstate Commerce Commission as one of their receiving and delivering stations for freight in the port of New York. In other words, the railroad company makes through rates to and from Brooklyn and itself absorbs the defendant's charges, which are, therefore, though included in the rates, not specifically mentioned in the tariffs filed.

The defendant receives all freight tendered it in cars by railroads at Jersey City for transportation to and delivery at Brooklyn. It also receives all freight tendered by the public at Brooklyn for transportation over its own lines and those of connecting carriers. It issues through bills of lading, but, under its contracts with the railroads, these are issued in the name of the railroad which is to receive the freight at Jersey City. These contracts provide that the defendant shall be responsible for the safety of all cars and freight while in its possession and that this responsibility "shall be enforceable by the railroad company, or others, as their interest shall appear."

The freight charges collected by defendant are paid over to the various railroad companies, which, in turn, pay to it its charges at the rates above stated.

ASSIGNMENT OF ERROR.

The holding of the Circuit Court of Appeals that the defendant is not a common carrier within the meaning of the hours-of-service act is error.

BRIEF.

I.

The defendant was organized to do a business usually done by a common carrier, has been recognized by the local authorities as a common carrier, and has itself, in a solemn pleading, claimed to be a common carrier.

II.

It has bound itself to serve and does serve indifferently a considerable part of the public by participating in the carriage of freight by common carriers and sharing the rates fixed in tariffs filed by them with the Interstate Commerce Commission, and is, therefore, a common carrier. *Taxicab Company* v. *District of Columbia*, 241 U. S. 252, 255; *United States* v. *Union Stock Yards*, 226 U. S. 286, 305; *United Stock Yards* v. *United States*, 169 Fed. Rep. 404, 406; *United States* v. *Erie Railroad Co.*, 237 U. S. 402, 407-408.

ARGUMENT.

The defendant actually conducts a part of the transportation between points on its railroad and points in other States. There can scarcely be a serious contention, therefore, that it is not engaged in the interstate transportation of freight. Is it also a common carrier?

It was organized to do a business usually done by common carriers, and under a law which imposes regulations, at least of its water transportation, which are not ordinarily imposed upon private carriers. And its rail transportation is only a necessary incident to its water transportation. It enjoys privileges in a public street which are accorded only to public service corporations. It transports over its tracks all freight tendered to it by or for railroads which hold themselves out as common carriers

of freight. Its charges are absorbed by the railroad companies in the tariffs which they file with the Interstate Commerce Commission. For its part of the transportation it thus receives a part of the through rate charged by the railroad companies. It has heretofore regarded itself as a common carrier and has asserted rights in this court upon a sworn claim to that effect.

The Circuit Court of Appeals said:

> That the terminal is a carrier can not be doubted, but a common carrier is one who by virtue of his calling undertakes to transport personal property from one place to another for all such as may choose to employ him, and everyone who so carries and delivers for compensation the goods of all persons indifferently is a common carrier. *United States* v. *Ramsey*, 197 Fed. Rep., 144.
>
> The point is too plain to need elaboration; this plaintiff in error is not a common carrier, for it transports only for those it has contracts with and only such goods as its patrons intrust to it; it does not carry for "all persons indifferently." (Rec., p. 30; 239 Fed. Rep. 287, 290.)

But in *Terminal Taxicab Company* v. *District of Columbia*, 241 U. S. 252, 255, speaking of the fact that as to a part of its business, under a contract with a hotel, a taxicab company limited "its service to guests of the hotel," it was said;

> We do not perceive that this limitation removes the public character of the service, or

> takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. * * * The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389. The public does not mean everybody all the time. See *Peck* v. *Tribune Co.*, 214 U. S. 185, 190.

The portion of the public which the defendant can serve is, on account of its location, limited to those who desire freight transported between Jersey City and points on its railroad, and further, on account of the nature of its business and equipment, to those who can tender freight in cars or freight destined to railroads which will furnish the cars. But, within these limitations, it receives and transports all freight to and from Brooklyn which is carried via Jersey City over the lines of the railroads which have no termini of their own in Brooklyn. It thus carries "indifferently" for so large a fraction of the public as to make it a common carrier.

The view of the Circuit Court of Appeals seemed to be that because the defendant gets all its business through contracts with railroad companies it does not serve the public. But these contracts confirm rather than destroy its character as a common carrier. By them, it enables the railroad to contract for the delivery of freight in Brooklyn, and itself agrees to receive and transport all freight destined

for transportation over railroads that will furnish the necessary cars.

That these contracts themselves make the defendant a common carrier is well illustrated by the case cited above. In that case, as stated by the court, the main question was whether the taxicab company was a common carrier. Its charter did not authorize it to exercise any of the powers of a public service corporation. The court, however, ruling that the question must be determined by what it did and not by what its charter said, found that its business was divided into three classes, viz:

First. It had a contract with the owner of the Union Railroad Station in Washington by which it was given the exclusive right to solicit taxicab business from persons passing to or from trains, and, in turn, agreed to provide a sufficient service to accommodate such persons.

Second. It had similar contracts with a number of hotels by which it was given the exclusive right to solicit in and about the hotels and agreed to furnish enough taxicabs to meet the demands.

Third. It maintained a central garage from which it furnished automobiles on orders, generally by telephone, but as to which it was under no contract to furnish service upon demand.

The court held that it was a common carrier as to the first and second classes, but not as to the third, with respect to which it was said:

> There is no contract with a third person to serve the public generally.

If a contract with a Union Station Company to serve that part of the public which passes through a railroad station, or a contract with a hotel to serve its guests, makes the contractor a common carrier, then surely contracts with 10 railroads to serve that portion of the public which desires to ship freight to or from Brooklyn makes this defendant a common carrier.

The principle announced in *United States* v. *Union Stock Yard*, 226 U. S. 286, so conclusively establishes the character of the defendant as a common carrier as to leave but little to be said. There are no material differences between the facts of that case and those of this case. The company in question, like the present defendant, was paid by the trunk lines instead of by the public, gave no bills of lading of its own, and received freight and hauled cars for that portion of the public that dealt with the trunk lines rather than the public generally. Disposing of the precise questions now involved, the court quoted, with approval, the opinion of Mr. Justice Van Devanter (while a circuit judge), speaking for the Circuit Court of Appeals in a similar case, *United Stock Yards Co.* v. *United States*, 169 Fed. Rep. 404, 406, as follows:

> Its [the Stock Yards Company's] operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds

> or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stock yards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate. *United States* v. *Union Stock Yard*, 226 U. S. 286, 305.

This seems to fully justify the claim heretofore made by the defendant that it is a common carrier.

Since counsel state that the only question involved is whether defendant is a common carrier, it is presumed that they now acquiesce in the ruling of the Circuit Court of Appeals that the employees named in the complaint were engaged in or connected with the movement of trains within the meaning of the

act. At any rate, that ruling was obviously correct. The contention to the contrary was based entirely upon the meaning supposed to have been given to the word "train" in the safety appliance act. That act makes it unlawful "to use" any locomotive not equipped in a certain way or "to run any train" that has not a sufficient number of cars equipped with air brakes to enable the engineer to control its speed without requiring brakemen to use hand brakes. Various other provisions forbade rail companies "to haul or permit to be hauled or used" in moving interstate traffic any car not equipped as therein required. 27 Stat., ch. 196, p. 531. No court, it is believed, has ever held that any string of cars pulled by a locomotive is not a train in the ordinary acceptation of that word. But it has been held that the airbrake requirement does not apply to the movement of cars in making up and breaking up trains in railroad yards and that, in view of the context, the train to which that requirement applies consists of an engine and cars assembled and coupled for a run or trip along the road. Thus this court has said:

> It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the

> air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars. *United States* v. *Erie Railroad Company*, 237 U. S. 402, 407–408.

In view of the fact that the running of trains with a certain number of cars not equipped with air brakes is what is forbidden, it may very well be inferred that Congress intended to permit such switching movements as are necessary to assemble into a train cars of both kinds. But aside from this, whenever an engine and cars have been assembled into a train any movement of such train is within the air-brake provision. Thus, in the case last cited it was held that this provision applied to a movement merely from one yard to another. Nor is it important that some of the cars in the train are to be dropped or others picked up at intermediate stations. It may be that the air-brake provision may not be applicable to the switching operations necessary at such stations to cut out or pick up cars, but it applies to all movements of the train in the progress of its journey. It seems obvious that even the air-brake provision

applies to the defendant's operations. As to incoming freight, its railroad operations begin at its Brooklyn docks. There it assembles and couples into a train an engine and a string of cars. It may be that the air-brake provision does not apply to such movements as may be necessary to accomplish that result. When the train is thus made up, if all of the cars in it are destined for the same unloading point, its journey to that point is just as much a train movement as if it was moved 100 miles. If the train is composed of cars destined for different unloading points, such switching as may be necessary to cut out cars at each point may not be subject to the provision, but when it starts on the journey to the next unloading station it resumes its train movement.

The safety-appliance act was intended to protect employees and passengers. With a single exception, all its provisions apply to *using engines or cars* in any way on railroads. The exception is that the air-brake provision is made to apply only to the *running of trains*. The reason is obvious. In such operations as are necessary to make up or break up trains a compliance with the air-brake provision, if not impossible, would be highly impracticable and a serious obstruction to traffic. Hence, courts have concluded that by using the expression *to run a train* in contrast with *to use a car*, Congresss has manifested a purpose not to attach to the word "train" its ordinary meaning, but to make the air-brake provision apply only after such movements of cars as

are necessary to make a train ready for its journey or trip. When, however, Congress came to pass the hours-of-service act there was no occasion for an exception. The object was to protect employees and the public from accidents resulting from overwork and fatigue. Danger from this source is probably greater in the yards than in main-line operations. Traffic will be no more impeded by observing reasonable hours in the one case than in the other. Congress clearly manifested its purpose not to make an exception of purely switching operations by refraining from following the language of the safety-appliance act and making the act apply to employees engaged in *running trains* and instead, in more comprehensive language, made it apply to employees "*actually engaged in or connected with train movements.*" One engaged in the switching necessary to make up a train or break it up, whether engaged in *running trains* or not, is certainly *connected with* train movements. His work involves the constant movement of trains or parts of trains, and the latter are themselves trains as that term is ordinarily understood. And since Congress has been careful to avoid the language it formerly used to give the word "train" an unusual meaning there is no reason for restricting its ordinary meaning.

Moreover, as we have seen, even in the most restricted sense, this defendant is engaged in *running trains* between its docks and the various points which it has established for receiving and delivering freight.

CONCLUSION.

It is respectfully submitted that the act in question applies and the judgment should be reversed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

NEAL L. THOMPSON,
Assistant Attorney.

DECEMBER, 1918.

○

INDEX.

	PAGE
Questions Involved Below	1
Questions Now Involved	2
Statement of Facts	3

POINTS.

First: Hours of Service Act:—how limited	7
Second: Terminal not a "common carrier"	8
Third: Terminal subject to Interstate Commerce Act, though not a common carrier	13
Fourth: Every railroad, though not a common carrier, subject to Safety Appliance Act	18
Fifth: Terminal not a "railroad"	21
Sixth: Drags of cars, being switched in Terminal's yard, not "trains"	23
Seventh: "Yardmen" in different case from "train-employees"; and therefore not needing nor accorded protection of Hours of Service Act	29

INDEX OF CASES CITED.

	PAGE
Atchison, T. & S. F. Ry. Co. *v.* U. S., 198 Fed. Rep. 637	26
Baltimore & Ohio R. R. *v.* Interstate Commerce Commission, 221 U. S. 612	7
Belt R. Co. *v.* U. S., 168 Fed. Rep. 542	19
Carson *v.* B. & A. R. R. Co., 164 Mass. 523	27
Clary *v.* C. M. & S. P. Ry. Co., 141 Wis. 411	27
Cox *v.* Great Western R. R. Co., L. R. 9 Q. B. Div. 106	27
Dacey *v.* Old Colony R. R. Co., 153 Mass. 112	27
Dunham *v.* Townsend, 118 N. Y. 281	5
Hines *v.* Stanley G. I. Co., 199 Mass. 522	20-27
Jackson Iron Works *v.* Hurlbut, 158 N. Y. 34	8
Ky. & I. Bridge Co. *v.* L. & N. R. R. Co., 37 Fed. Rep. 567	12
LaMere *v.* Railway Transfer Co., 125 Minn. 159, 145 N. W. Rep. 1068	25
Lynch *v.* Great Northern Ry. Co., 112 Minn. 382	27
McChord *v.* Camell, 60 Law Journal Q. B. N. S. 203	27
McNamara *v.* Washington Terminal Company, 37 App. D. C. 384, 39 Washington Law Rep. 458	17
St. Clair *v.* Interstate Transfer Company, 192 U. S. 454	22
San Pedro Co. *v.* U. S., 213 Fed. Rep. 326	32
Shea *v.* N. Y., N. H. & H. R. R. Co., 173 Mass. 177	27

PAGE

Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498 14

Taggart *v.* Republic Iron & Steel Co., 141 Fed. Rep. 910 21

Terminal Taxicab Co. *v.* District of Columbia, 241 U. S. 252 18

Texas & Pacific Railway Co. *v.* Henson, 56 Texas Civ. App. 468, 121 S. W. Rep. 1127. 10

United States *v.* Baltimore & Ohio R. R. Co., 200 Fed. 779, 231 U. S. 274 4

U. S. *v.* B. & M. R. R. Co., 168 Fed. Rep. 148 28

U. S. *v.* C. B. & Q. R. R. Co., 237 U. S. 410. 25

U. S. *v.* Chicago, M. & P. S. Ry. Co., 218 Fed. Rep. 701, 219 Fed. Rep. 632 7

U. S. *v.* Erie R. R. Co., 237 U. S. 402 24

U. S. *v.* Grand Trunk Railway Co., 203 Fed. Rep. 775 25

U. S. *v.* Pere Marquette Ry. Co., 211 Fed. Rep. 220 26

U. S. *v.* Ramsay, 197 Fed. Rep. 144 ..... 8, 18

U. S. *v.* Union Pacific R. R. Co., 213 Fed. Rep. 332 10

U. S. *v.* Union Stockyard, 192 Fed. Rep. 330, 226 U. S. 286 15

U. S. *v.* Union Stockyard Co. of Omaha, 161 Fed. Rep. 919, 169 Fed. Rep. 404 20

INDEX OF TEXT BOOKS CITED.

6 Cyc 366 8

6 Cyc 375 9

6 Cyc 501 9

Moore on Carriers, Section 43 11

Elliott on Railroads, Par. 1399 11

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, Petitioner, vs. BROOKLYN EASTERN DISTRICT TERMINAL.	No. 155.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE BROOKLYN EASTERN DISTRICT TERMINAL.

Questions Involved Below.

The questions involved were thus stated in defendant's brief in the Court below:

> "1. Whether the Brooklyn Eastern District Terminal (hereinafter referred to as the Terminal) is a 'common carrier'.

> 2. Whether, if so, the Terminal is, within the meaning of the Act, 'engaged in the transportation of property by railroad'.
> 3. Whether, if so, the employees concerned were 'actually engaged in or connected with the movement of any train' ".

The Government's brief below stated as one of the questions involved—"Is the defendant engaged in interstate commerce?" As to this the Terminal's brief below stated:

> "The Terminal has not denied, and does not question, that it is engaged in interstate commerce. Its denial is only that it is engaged in interstate commerce *by railroad*".

The brief for the United States now states that in the Court below the "case was contested on the second and third issues" there mentioned. If by this is intended that it was not contested on the remaining issue, to wit "Is defendant engaged in the interstate transportation of passengers or property *by railroad*", the statement is an error.

Questions Now Involved.

The questions now involved are, necessarily, the three above stated as involved in the Court below. It is said in the brief for the United States that

> "As stated in the brief in opposition to the writ of certiorari, the only question now in contest is whether defendant is a common carrier".

This is a misconception of the situation. Upon the petition for a writ of certiorari, the defendant's brief did state, correctly, that the only question *then* involved, in the determination whether

the writ should issue or not, was whether the defendant was a common carrier; because that was the only question which below had been decided adversely to the Government. But, the writ having been issued, the issue now presented is whether the judgment below should be reversed, and it cannot be reversed without deciding adversely to the petitioner each of the three questions above stated.

The Facts.

The case was tried in the District Court and heard in the Circuit Court of Appeals upon an "agreed statement of facts" (pp. 6-9) stipulated to be "all the material facts at any trial of this cause" (p. 7). Apparently the petitioner, or perhaps rather the Interstate Commerce Commission upon whose request the prosecution was instituted (p. 2), now fears to present its case to this Court upon this agreed statement of facts alone; for in its statement of "the facts" in its brief, it invokes the consideration by this Court of two alleged "facts", neither of which is contained in the "agreed statement of facts" upon which the case was necessarily determined in the Courts below, and one of which is inconsistent with a fact there explicitly admitted.

1. The brief states (page 4)—

> "The local authorities have recognized it [the Terminal] as a common carrier or public-service corporation by permitting its tracks to be laid in a public street and to cross street-car tracks at several places".

There is no evidence, and it is not the fact, that the local authorities have recognized the Terminal either as a common carrier or a public-service cor-

poration, or granted it any permission to lay tracks, or to do anything else than to exercise its chartered privilege of navigating vessels. On the contrary, the fact as admitted by the petitioner (pp. 7, 10) and found by the District Court (p. 15) is that it is "as lessee of Havemeyers & Elder", that the defendant operates its Terminal station, including these tracks. From this fact the presumption perhaps would be, though it happens not to be the fact, that it is to Havemeyers & Elder that the local authorities have granted permission to maintain these tracks. The fact is, if statements of facts not to be found in the record are to be indulged in, that "the local authorities" have persistently refused, for the very reason that the Terminal has not the charter power to operate a railroad, to "recognize" the Terminal in any way, or to grant to it any franchise or permission whatever with regard to these tracks.

2. It is a fact admitted by the stipulation (p. 9) and found by the District Court (p. 17) that

> "Defendant does not hold itself out as a common carrier".

Nevertheless, the petitioner in its brief (page 8) states that the defendant "has itself in a solemn pleading claimed to be a common carrier"; and asks this Court to take judicial notice that the defendant, in an intervening petition filed by it on May 11th, 1911, in the case of United States *v.* Baltimore & Ohio R. R. Co., (200 Fed. Rep., 779), in the Commerce Court of the United States, the decree of which Court was subsequently affirmed by this Court (*id.* 231 U. S., 274), alleged that the defendant was then "engaged as a common carrier in the transportation of property partly by

railroad and partly by water, the transportation by water being performed by your petitioner under arrangements hereinafter stated in detail with the railroads——for a continuous carriage or shipment from one state to another."

It is understood to be the rule that "the production of record evidence is never allowed in an Appellate Court for the purpose of reversing a judgment", though sometimes permitted for the purpose of sustaining a judgment (*Dunham* v. *Townsend*, 118 N. Y., 281).

An examination, however, of the intervening petition in question will show that the facts with regard to the petitioner's method of doing business, including a copy of its contract with the railroads, were set forth in great detail, and that in respect to its status as an intervenor it was wholly immaterial whether as a question of law they constituted the Terminal a common carrier or not. The allegation that they did was an erroneous conclusion of law,—an error perhaps pardonable in view of the fact that five years later, when the question was for the first time presented to the courts, the District Court and the Circuit Court of Appeals disagreed upon it. Undoubtedly, the allegation should have read, and the thought intended to be expressed by it was, that the defendant was "engaged, in the service of common carriers, in the transportation of property," &c. It would be a cruel and unusual punishment for an inadvertent error of law, committed in 1911, against which the statute of limitations has now run, and of which the court below could know nothing, to consider it a reason here for reversing its judgment and convicting the defendant of a violation of a penal statute. It is surely upon nothing

else than the view taken by this court of the law applicable to the stipulated facts that this case will be decided.

The importance here of the record in this case of U. S. *v.* B. & O. R. R. Co. is not that it contained a blunder in the description of itself by the defendant, but that it set forth a full and accurate account of the methods by which the business of the Terminal Companies in New York Harbor, including that of this defendant, is transacted; that upon this record this court found as a matter of law that it is the railroads with whom these Terminals have these contracts and not the Terminals themselves which are the common carriers who transport the freight across the harbor between the Terminals and the Jersey City stations of the railroads; and that though the contract between the railroad and one of these Terminals (the Jay Street Terminal) provided, as that in the instant case does not, that the Terminal should not be required to carry freight which might be classed "as prohibited freights in the joint published tariffs of itself and the Railroad Company", even such a provision, in the language of the syllabus (231 U. S. 275),

> "Does *not* make the owners of the terminal *common carriers*, if no joint tariffs *are* ever filed or published".

3. The petitioner's brief cites (page 3) a provision of the New York "Navigation Corporations Law" under which the defendant is incorporated, making it "the duty of the owners or lessees of any steamboat * * * to receive and transport the bicycle of any passenger as ordinary baggage". Of course this applies only to a steamboat

plying as a common carrier of passengers for hire. The argument of the petitioner is that it would make a common carrier of a navigation corporation though operating but a single vessel solely for the transportation of the products of a single factory!

Except as above noted the statement of the facts in the petitioner's brief appears to be entirely fair.

POINTS.

First: The Hours of Service Act applies, not to all interstate commerce carriers, but only to "common carriers" "engaged in the transportation of passengers or property by railroad"; and not to all the employees of such carriers, but only to those "actually engaged in or connected with the movement of any train" which is "engaged in the [interstate] transportation of passengers or property by railroad".

Baltimore & Ohio R. R. v. *Interstate Commerce Commission*, 221 U. S. 612, 617.

> *By the Court* [in sustaining the constitutionality of the Act]: "The employees to which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate, or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted."

U. S. v. *Chicago, M. & P. S. Ry. Co.*, 218 Fed. Rep. 701; 219 *id.* 632.

By the Court: "Perhaps Congress might have made the Hours of Service Act comprehend, but plainly it did not make it comprehend, all persons employed by a railroad company 'engaged in interstate commerce'. It expressly restricted its application to certain classes of persons rendering certain specified services." (219 Fed. Rep. 634.)

Second: The Terminal is not a common carrier:

> "Congress in passing the act in question [the Hours of Labor Law] must have intended to use the term 'common carrier' in the usual and ordinary acceptation of the term, viz., as one engaged in the business of carrying persons and property from one place to another for compensation for all who should apply to have their goods transported or to be transported in person." (*U. S.* v. *Ramsey*, 197 Fed., Rep. 144, U. S. Cir. Ct. of App., 8th Cir., May, 1912.)
>
> "A common carrier is one who by virtue of his calling undertakes for compensation to transport personal property from one place to another for all such as may choose to employ him." (*Jackson Iron Works* v. *Hurlbut*, 158 N. Y. 34, 38.)
>
> "A common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a public employment." (*6 Cyc. 366.*)

The Terminal, it is stipulated (p. 9) and found as a fact (p. 17), "does not hold itself out as a common carrier". It files no tariffs (p. 17). Nor does it undertake to transport property "for all who should apply to have their goods transported". It transports only such freight as is deliv-

ered to it by or for those carriers only with whom it has elected to make special contracts to perform for them a part of the carriage the whole of which they have undertaken with the shipper to perform; and as to which such carrier, and not the subordinate instrumentality it employs, is the common carrier. The Terminal has no relations with shippers or consignees. It issues no bills of lading to them; receives no compensation from them; and is under no liability to them. It is the railroad by whom the Terminal is employed who, as to east bound freight, assumes liability for it until delivered to the Brooklyn consignee at the Terminal's station, which, by its tariff, the railroad has made its own; and who, as to west bound freight, there receives it, there issues the bill of lading for it, and is alone liable to the shipper for it from the moment of its receipt. The Terminal's liability is to the railroad only.

No would-be shipper could sue the Terminal for refusing to receive his freight,—a necessary liability of every common carrier (*6 Cyc. 375*); nor has the Terminal any lien for its charges on the freight it transports,—a necessary right of every common carrier (*6 Cyc. 501*).

In fine, in the very language of the Circuit Court of Appeals for the 8th Circuit, in the *Union Pacific* case, *infra*,

> "The Terminal Company was [is] an employee of the defendant [the railroad], incorporated, it is true, but as much so as if its individual servants had done the work."

And the Terminal, as the employee of the railroad in transporting on its floats across the East and Hudson Rivers the railroad's freight, stands

in the same relation to the railroad as the Terminal's stevedore who wheels it across the loading platform from the truck to the freight car stands to the Terminal; and the Terminal is every whit as far from being a common carrier as is that stevedore.

U. S. v. *Union Pacific R. R. Co.*, 213 Fed. Rep. 332 (U. S. Cir. Ct. of App., 8th Cir.):

> *By the Court*: "Though the Terminal Company was incorporated and had its own engines and employees, the evidence showed that in the handling of the car of horses it did not act as an independent carrier, but was a mere agency or instrumentality, which defendant used to perform its transportation duties. . . . The Terminal Company did not hold itself out to the public as a connecting carrier, and the shipper did not know it as such. . . . It [the carload of horses] . . . was in the custody of a local instrumentality which defendant selected and used to discharge its duties both to the shipper and under the statute, and for whose conduct it was responsible. The Terminal Company was an employee of the defendant, incorporated, it is true, but as much so as if its individual servants had done the work."

Texas & Pacific Railway Co. v. *Henson*, 56 Tex. Civ. App. 468; 121 S. W. Rep. 1127:

> *Headnote* (S. W. Rep.): "A Belt Line Railway Company, chartered as a railroad company, owning four or five locomotives and one flat car and about fourteen or fifteen miles of track; which makes connection with various railroad companies and switches cars for these companies to stockyards and other railroad connections, but which has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contract with them,

and is paid for its services by the railroad companies, is not a 'common carrier' within the meaning of Acts of 1905, page 29, Chapter 25, Section 1, providing that any common carrier doing business as such in the state may be sued . . . in any county in which such carrier does business."

By the Court: "Under these circumstances, we hold that the Belt Railway Company is not a common carrier within the meaning of the act above quoted, but that the same was merely the agent of the appellant [the Railway Company] employed by it as a means of carrying out the contract of shipment with appellee Henson. . . . While there may be some contrariety of holding on this question, still we think the weight of authority, as well as the better reason is in favor of the conclusion we have here reached. In *Elliott on Railroads*, paragraph 1399, it is said: 'If the transfer company simply acts as an agent of the initial carrier in transferring the goods, then the transfer company cannot be justly regarded as a connecting carrier; nor can it be so considered where the initial carrier simply employs it for its own convenience. Ordinarily the question whether the transfer company was or was not an agent or employee of the initial carrier must be determined from the facts of the particular case.' So in *Moore on Carriers*, section 43, it is said: 'But a corporation, which, being under no legal obligation to do so, voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.' The text of these two writers appears to be based

upon, and is supported by, the case of *Ky. & I. Bridge Co.* v. *L. & N. R. R. Co.*, 37 F. R. 567."

It is an immaterial detail that the railroad's cars are transported across the East and Hudson Rivers on tugs and car floats owned and operated by the Terminal rather than upon a bridge across these rivers owned and operated by it. Except for this immaterial detail, the following case is in point:

Kentucky & I. Bridge Co. v. *Louisville, etc., R. R. Co.*, 37 Fed. Rep. 567, 615, 617:

> *By the Court*: JACKSON, *C. J.*, BARR, *D. J.*, concurring: "Petitioner [owning a bridge across the Ohio River on which car tracks connected with certain switching tracks and with defendant's tracks and also owning five engines] is not in law or in fact a common carrier of property or freights within the true meaning of section 1 of the act to regulate commerce; and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company or agency engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line or connection to another. . . .
>
> Nor does petitioner in the legal sense of the term act or hold itself out to the public as a common carrier of property in connection with the railroad on either side of the Ohio River. It has no freight cars. When it solicits or accepts freight upon its tracks on either side of the River for any railroad company, it is compelled to call upon the rail-

> road for whom the freight is intended or over whose line it is to go to furnish the cars in which to load the same. Such cars the petitioner merely transfers over its bridge and delivers to the railroad furnishing the same, charging for its service its regular bridge toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. . . . In respect to cars or traffic thus handled, petitioner can only be regarded as a switchman or transfer company. In the performance of such service, it is no more a common carrier of interstate commerce or traffic within the provisions of the law, than a city transfer company which checks a passenger's baggage at the hotel where it is received, and carries it for an agreed compensation to the station of the railroad over which it is to be transported into another state. The act to regulate commerce does not extend to such agencies or embrace such transfer companies.

Third: The validity of the conclusion that the Terminal is not a common carrier is in no way affected by the fact that it is doubtless subject to the Interstate Commerce Act and the jurisdiction by that Act conferred upon the Interstate Commerce Commission, so that it may not give rebates, unjustly discriminate, give undue preferences or refuse the Commission access to its books, etc. It is thus subject to the Interstate Commerce Act because the term "railroad" as used in that act is expressly declared to include "all switches, spurs, tracks and *terminal facilities* of every kind", and the term "transportation" to include "all instrumentalities and facilities of shipment or carriage, irrespective of ownership

or of any contract, express or implied, for the use thereof."

It was (1) because of the effect of these definitions; (2) because the statutes under which the companies were incorporated expressly declared them to be common carriers; and (3) because, instead of being independent organizations like the Terminal in which it is not claimed that any carrier has any interest whatever their stock was owned and they were controlled by the railroads whom nominally they served, that the terminal companies in the following cases were held to be subject, not to the Hours of Service Act, but to the Interstate Commerce Act or the Employers' Liability Act.

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498:

The Terminal Company owned wharves at Galveston with tracks upon them connecting with those of the Southern Pacific Railroad. The title to its property was derived from grants upon condition that it should be used for the maintenance of terminal facilities for the Southern Pacific Railroad and Steamship Systems, and ninety-nine per cent. of its stock, as well as of the stock of the Southern Pacific Railroad and Steamship Systems, was owned by the Southern Pacific Company. *Held*, that because the different corporations were all under the control of one Company as "part and parcel of the system engaged in the transportation of commerce", the Interstate Commerce Commission had jurisdiction to compel the Terminal Company to cease and desist from giving undue preferences and advantages to one shipper over others.

By the Court: "It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation by the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies. . . . Surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. . . .

The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. It is with the system that the law must deal, not with its elements." [Citing the provisions of the Interstate Commerce Act above referred to.]

U. S. v. *Union Stockyard*, 192 Fed. Rep. 330; 226 U. S. 286.

The Stockyard Company was incorporated with power to maintain and operate a stockyard, and, in connection with it, to build, operate and maintain a railroad from the stockyard to a connection outside of the City limits with the railroads entering the City, and over this railroad to transport "freight and property of every kind, as well as stock and cattle". After its incorporation, the Stockyard Company leased its railroad tracks and equipment to the Junction Company. The Junction Company was incorporated under the Gen-

eral Railroad Law of Illinois and was therefore necessarily, it was conceded and found, a common carrier. Practically all the stock of both companies was held in a common ownership by an investment company. *Held*, that the Investment Company and the Stockyard Company as well as the Junction Company were properly enjoined, under the provisions of the Interstate Commerce Act, from performing a contract by which they had agreed to give to a certain shipper what was, in effect, a rebate.

> *By the Court* [quoting the provisions of the Interstate Commerce Act above mentioned]: "Together these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the Act and perform services as a railroad, when they take the freight delivered at the stockyards, load it upon cars and transport it for a substantial distance upon its journey in interstate Commerce under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies and complete its delivery to the consignee. *They are common carriers because they are made such by the terms of their charters, hold themselves out as such*, and constantly act in that capacity; and because they are so treated by the great railroad systems which use them. . . . We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits, and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to Regulate Commerce; and the services which they perform are included in the definition of transportation as defined in that Act." (226 U. S. 304, 5, 6.)

McNamara v. *Washington Terminal Company*, 37 App. D. C. 384; 39 Washington Law Rep. 458:

> "The Washington Terminal Company, by its incorporation under the powers conferred by the act of Congress, is vested with all the rights, powers and privileges of a railroad company. By the act of Congress . . . it is given the power to contract with other lines of railroad entering the City; and such railroad companies are compelled to contract with the Terminal Company for the use of its lines in order to gain access to the Union Station."

By the same act "all claims for loss and damage arising from or in connection with the administration, operation and use" of the Terminal Company's property are made obligations of the Terminal Company, as distinguished from the railroads which use its tracks. Upon its own behalf, and not as agent of the railroad, it deals with passengers from the time they enter the station until they board the trains. "Steam railroad passenger traffic, entering and leaving Washington, is thus completely and exclusively managed, operated and controlled by the Terminal Company within the zone occupied by its station and tracks" (192 Fed. Rep. 347). The whole of the Terminal Company's capital stock is owned by the two railroads whose tracks enter its station.

> *By the Court:* "In the case at bar, the Terminal Company's railroad and station form a part of the system over and through which all commerce centering at the Washington Union Station must pass. In each instance, the agencies in question are no less common carriers engaged in trade and commerce than are any other parts of the tenant or connecting lines of railroad. If we accord to the act

> the liberal construction essential to make it apply to the subject sought to be regulated by Congress, we must hold that the Washington Terminal Company is a common carrier within the meaning and intent of the Employers' Liability Act."

Terminal Taxicab Co. v. *District of Columbia*, 241 U. S. 252.

This case arose under a statute subjecting every "public utility" *or* "*common carrier*" to the orders of a Commission, and declaring that the phrase "common carrier" should be held to include "every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire."

This Court held that the Taxicab Company was an agency for public use for the conveyance of persons within the District. The decision throws no light upon the question here whether the Brooklyn Eastern District Terminal is a common carrier, "in the usual and ordinary acceptation of the term" (*U. S.* v. *Ramsey*, *supra*).

Fourth: For similar reasons, decisions sustaining prosecutions against transportation corporations for violation of the provisions of the Safety Appliance Act requiring the use of automatic couplers, grab-irons and draw-bars cannot properly be cited as decisions that the corporations in question were "common carriers."

The Safety Appliance Act is a double barrelled one. Its provisions as to power brakes apply to "trains" only; those as to automatic couplers,

grab-irons and draw-bars, to individual "cars." These provisions relating to cars apply to all cars "used on any railroad engaged in interstate commerce" (amendment of March 2, 1903), whether a common carrier or not. Therefore, while decisions under the power brake provisions of the Act determining what are and are not "trains," ought apparently to be considered as establishing the meaning of the same word when used in the Hours of Service Act, decisions under the other provisions of the Act regarding automatic couplers, etc., upholding judgments for penalties for the use of "cars" not properly equipped with them, necessarily involve a determination only that the cars were being used "on a railroad engaged in interstate commerce"; for, if so, it is immaterial whether the railroad be a common carrier or not. And perhaps without exception, in every one of these cases it will be found that where the Court declared the defendant to be a common carrier, and on that ground assessed a penalty against it for the use of improper couplers, etc., the defendant was either a railroad, or a stockyard or terminal company likewise clothed by its charter with all the powers of a railroad and therefore, in either case, expressly declared to be a common carrier by the laws of the State incorporating it.

Thus in *Belt R. Co.* v. *U. S.*, 168 Fed. Rep. 542, the Belt Railway Company, which operated a main line of twenty-one miles around Chicago, was an Illinois railroad corporation, and therefore in the same case as the *Chicago Junction Railway Company*, of which the Circuit Court of Appeals later had occasion to say (192 Fed. Rep. 330, 336):

> "That it is a common and not a private carrier, if it be a carrier at all, is manifest from the fact that it is organized under the General Railroad Law of Illinois. Under its Constitution (article 11, §12) all railroads are 'declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law.'"

So in the case of *U. S.* v. *Union Stockyards Company of Omaha*, 161 Fed. Rep. 919; 169 *id.* 404, the defendant was incorporated, among other things, "to construct, maintain, and operate a railroad . . . which shall be operated for the purposes . . . of carrying passengers and freight for the general public"; and the Court said:

> "In this case the defendant must be held to be a common carrier for another reason. The Constitution of Nebraska, art. 11, section 4, declares that 'railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon. . . . The liability of railroad corporations as common carriers shall never be limited.'"

The case of *Hines* v. *Stanley G. I. Co.*, 199 Mass., 522, arose under the Massachusetts Fellow Servant Act, giving an employee a cause of action for an injury caused by "the negligence of any person in the service of the employer who has the charge or control of any locomotive engine or train upon a railroad." It has no pertinence to the inquiry whether or not the Terminal is a common carrier.

Fifth: The Terminal is not "engaged in the transportation of property by railroad"; and for that reason also is not subject to the Hours of Service Act.

1. The map of the Terminal's property (p. 8) itself sufficiently demonstrates that the conglomeration of tracks there depicted, "all located within a radius of approximately ¼ mile" (p. 7), most of them less than one city block in length, beginning nowhere and leading nowhere, constitutes, not a railroad, which a navigation corporation is not authorized and presumably would not be permitted to operate, but a switching yard only, which it may properly operate as a necessary adjunct to its car float service. Something more than a few contiguous rails back and forth over which a car may be switched for one or two city blocks, is required to furnish "transportation by railroad". That in every proper sense begins and ends, in the case at bar, at the railroad's termini in Jersey City. Merchandise in a car being shunted back and forth over the maze of tracks shown on this map is not being "transported by railroad." It is being made ready for transportation by water to the railroad or is being delivered after such transportation.

Taggart v. *Republic Iron & Steel Co.*, 141 Fed. Rep. 910 (Circuit Court of Appeals, 6th Circuit):

The defendant owned and operated, in connection with its rolling mill, a number of tracks and switches in the yard inclosing its plant; and on these tracks a switch engine for convenience in shifting freight cars. The question was involved

whether a statute requiring railroad companies to block their frogs, applied to the defendant.

> *By the Court:* "Although by the law of Ohio a manufacturing company may construct a railroad when such purpose is stated in its articles of incorporation, . . . and with respect to it is made subject to the general railroad laws of the State, we are not satisfied that the yard tracks and switches operated by the defendant in the manner we have described come within the intent and meaning of this statute. . . . *They do not seem to us to constitute a railroad*, or make this manufacturing company a railroad corporation, under the law of Ohio. We might as well hold that every private switch constitutes a railroad and makes the person or company owning and operating it a railroad corporation. These yard tracks are nothing more than private switches and were only used as such."

2. The Terminal's car floats in their daily movement between its station and the different railroad termini in Jersey City, Manhattan and the Bronx, do not constitute "ferries used or operated in connection with any railroad" which the Act declares the term "railroad" shall include; although it would be immaterial if they did, since the employees in question were not "engaged or connected with the movement of" these car floats but of cars over the switching tracks (p. 18).

St. Clair v. *Interstate Transfer Company*, 192 U. S. 454, 467, 468:

> *By the Court:* "The difference between a ferry in its true sense and transportation of the character of that now under review [transporting railroad cars loaded or unloaded across the Mississippi River] is shown

in the case of *Mayor of New York* v. *New England Transfer Company,* 14 Blatch. 159. . . . . We conclude from the considerations previously expressed that the transportation of railroad cars—whether loaded or unloaded —across the Mississippi River at the point in question was not the maintenance of a ferry in the proper sense of that term."

Sixth: Even if the Terminal could be held to be a common carrier, and one engaged in the transportation of property by railroad as well, the employees in question in the case at bar were not "actually engaged in or connected with the movement of any *train*".

1. On this point the only finding of fact is that the employee "in connection with the work of switching cars between defendant's floats and its warehouses and various tracks . . . was connected with and employed in the movement and switching over defendant's tracks of cars containing freight destined to or shipped from both interstate and intrastate points" (p. 18) and that "the number of cars so hauled as a part of one movement varies from a single car to seven or eight cars" (p. 16).

There is no evidence or finding of fact that either employee was engaged in or connected with the movement of any train, unless a "switching locomotive", hauling one or more cars along one of the Terminal's switching tracks in the process of switching, constitutes "a train". It is authoritatively settled that it does not.

The Safety Appliance Act of March 2, 1893, forbade, after January 1, 1898, "any common car-

rier engaged in interstate commerce by railroad . . . to run *any train* in such traffic after said date" not sufficiently equipped with power brakes; and the amendment to this Act of March 2, 1903, declared that its provisions "relating to train brakes", etc., "shall be held to apply to *all trains*". Although these Acts thus apply to "any train" and "all trains", it is authoritatively settled that they do not apply to aggregations of cars, however many, while in process of being switched in switching yards by switching locomotives; for the reason that such aggregations of cars and a switching locomotive can constitute a train only when duly proceeding on a journey from one point to another upon the main line of the railroad.

U. S. v. *Erie R. R. Co.*, 237 U. S. 402:

> *By the Court:* "We cannot assent to the view that the yards at Jersey City, Weehawken and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intra-yard movements, and are in actual practice treated as separate yards. . . . As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision; but it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains, which have completed their runs, are broken up. These are not train movements but mere switching operations."

U. S. v. *C., B. & Q. R. R. Co.*, 237 U. S. 410:

> *By the court:* "We think these trains [proceeding over 'a main-line track' 'by which passenger and freight trains enter and leave the city, for a distance of about two miles from one yard to another'] came within the air-brake requirement which the amendatory Act of 1903 declares 'shall be held to apply to all trains . . . on any railroad engaged in interstate commerce'. According to the fair acceptation of the term, they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main-line track —one that was a busy thoroughfare for interstate passengers and freight traffic."

La Mere v. *Railway Transfer Company*, 125 Minn. 159; 145 N. W. Rep. 1068:

The transfer in this case was from the yards of the defendant over the main lines of the Minneapolis and St. Louis Railroad for about a half mile to the yards of the Chicago, Milwaukee & St. Paul Railroad.

> *By the Court:* "We are of the opinion that it should be held that the so-called 'drag' [consisting of 15 cars] was a train within the meaning of the Safety Appliance Act. The switching had been finished when the cars were on track 7 and coupled. They were then starting on their way. It was not in a proper sense a switching operation at all."

U. S. v. *Grand Trunk Railway Company*, 203 Fed. Rep. 775 (U. S. Dist. Court, W. D. N. Y., Hazel, *D. J.*):

> "The cars constituting the train were hauled from Black Rock in Buffalo to Bridge-

> burg in Canada, a distance of approximately two miles. . . . The cars were not engaged in the performance of a switching operation, nor were they moving in the yard of the defendant company. But the evidence as to one cause of action set forth in the complaint shows that nine cars were coupled and loaded and hauled by a locomotive, and as to the other cause of action that there were twenty-five coupled loaded cars similarly hauled on the main track to Bridgeburg, from whence they were destined to other points. I think the journey was fairly initiated at Buffalo, and that the cars coupled to the locomotive constituted a train."

Atchison, T. & S. F. Ry. Co. v. *U. S.*, 198 Fed. Rep. 637 (U. S. Circuit Court of Appeals):

> *By the Court:* "Cars that are destined to plaintiff in error's inner yard at 18th Street are assembled at Corwith into a train and moved about eight miles to 18th Street over switch tracks, leads and main tracks of plaintiff in error across a drawbridge and three railroads."
>
> *Headnote:* "*Held*, that such section [Safety Appliance Act] was not limited to road trains, but applied to interstate trains destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew."

U. S. v. *Pere Marquette Ry. Co.*, 211 Fed. Rep. 220 (U. S. District Court):

> *By the Court:* "It must be conceded that sixteen cars and a locomotive, coupled and moved together for two miles upon the main tracks of a railroad line, through a large city and across several streets, constitute a train within the purview of the statute [the Safety Appliance Act]."

Clary v. *C., M. & S. P. Ry. Co.*, 141 Wis. 411; 123 N. W. Rep. 649:

> *Headnote* (N. W. Rep.): "Where a railroad rule relating to yard limits provided that all trains will move under perfect control so as to make an accident impossible, the word 'train' did not include a switch engine and two freight cars en route from one end of the yard to the other; but did include a regular freight train moving into the yard from a point outside."

Lynch v. *Great Northern Ry. Co.*, 112 Minn. 382; 128 N. W. Rep. 457:

> *Headnote* (N. W. Rep.): "A switch engine drawing six cars of logs from one part of a switching yard to another part thereof is not a 'train' within rules laid down by a railroad company for employees in 'freight train' service."

2. No case was cited to or by the court below to support the contention that a drag of one or more cars being hauled to and from a switch yard by a switch engine constitutes a "train."

The cases of *Cox* v. *Great Western R. R. Co.*, L. R. 9 Q. B. Div., 106, and *McChord* v. *Camell*, 65 Law Journal, Q. B. N. S. 203, both arose under the English Servant Act, abolishing the Fellow-Servant defense in case of an injury "by a reason of the negligence of any person who has the charge or control of any signal, points, locomotive *engine or train* upon a railway." And the cases of *Dacey* v. *Old Colony R. R. Co.*, 153 Mass., 112; *Shea* v. *N. Y., N. H. & H. R. R. Co.*, 173 Id. 177; *Carson* v. *B. & A. R. R. Co.*, 164 Id., 523; and *Hines* v. *Stanley G. I. Co.*, 199 Mass., 522, all arose under the similar Massachusetts Act abolishing the de-

fense in case of an injury caused by "the negligence of any person in the service of the employer, who has the charge or control of any locomotive *engine or train* upon a railroad."

Of course under such statutes, where there is an engine it is immaterial whether or not there are cars attached to it, or whether the aggregation constitutes a train.

And in the case of *U. S.* v. *B. & M. R. R. Co.*, 168 Fed. Rep., 148, the movement was not in a yard; but, on one day "from Springfield to the Brightwood Yard," and on the next "from the Brightwood Yard northerly."

3. The Safety Appliance Act was passed March 2, 1893, and the amendment to it March 2, 1903. It was not until March 4, 1907, that the Hours of Service Act was passed. The identical phrase "any train," employed in the earlier act, was taken over into the later one. It is a cardinal principle of construction, indispensable to the orderly administration of justice, and particularly in the enforcement of penal statutes, that in the case of two successive statutes, both relating to the same general subject,—in this case the safety of railroad employees,—where a phrase having a perfectly settled significance in the earlier Act is repeated verbatim in the later one, it must be with the intention of attributing to it the same significance.

> "Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject matter, it will be understood as using it in the same sense" (36 Cyc. 1150).

Unless this canon of construction shall be followed here the utterly anomalous situation may well arise that the Terminal must under the Safety Appliance Act be acquitted, and under the Hours of Service Act convicted, of having operated as "a train" the same drag of cars in the same switching movement in its yard.

4. The whole matter comes down to this: that the present prosecution cannot be sustained, except by judicially amending the Hours of Service Act so as to make the concluding clause of its first section read as follows:

> "The term 'employees' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train, *or the switching of one or more cars.*"

If such an amendment be desirable, it should be left to Congress to make it.

Seventh: The purpose of the Hours of Service Act is declared by Congress to be "to promote the safety of employees and travelers *upon railroads*"; and it is accordingly made applicable both to employees "actually engaged in or connected with the movement of *any train*", and to "train despatchers" giving orders "affecting train movements".

There were sound reasons why Congress thus refused, and why the Courts should refuse, to extend the Act to include employees connected only with switching operations in a yard.

The learned judge who wrote the opinion in the Court below attributed to the Act a wider pur-

pose than that professed by Congress itself, and gave it a wider scope than that authorized by the language which Congress used. The opinion states:

> "Men may as easily work beyond the limits of reliability and health on 'drags' of cars as on the same number of cars traveling the open road; indeed, we think the work in yards probably more onerous and exacting.
>
> The object of this statute is the preservation of efficiency by keeping the body sound; and having regard to that legislative purpose we have no hesitation in holding that the "switching crews" of the Terminal were "engaged in the movement of a train" within the meaning of the statute, although the same collocation of cars and engines would not be [the Court did apparently "hesitate" to say 'a train'] within the air-brake provision of the Safety Appliance Act" (p. 29).

The above is thus echoed in the petitioner's brief (p. 18):

> "The object was to protect employees and the public from accidents resulting from overwork and fatigue. Danger from this source is probably greater in the yards than in main-line operation".

With great respect both to Court and counsel, it is submitted that they here not only attribute to Congress an intention which it itself disavowed, but misconceive the situation which it had in mind and sought to remedy.

1. The perils likely to be incurred by overworking train employees are vastly greater than any which can result from the errors of any switching crew working only in a switching yard. To mis-

manage "the movement of any train", is not only to imperil the lives of all its crew, if a freight train, and of all its passengers, if a passenger train, but also to incur the risk of derailments of other trains and further loss of life and property on them. An error in switching operations in the yard, on the other hand, may result at most in some injury to a car, or to a switch tender or a brakeman. Such are deplorable enough; but—

2. The switch tender or brakeman working in a switching yard gets the protection against the results of overwork to which he, equally with the passengers of the limited express, is entitled,—but he gets it by the force of the circumstances under which he is employed; and he does not need that compelled by the statute to be accorded to train employees sent out for a journey on the line.

There is no temptation to work the yardmen even the sixteen hours limited by the statute in the case of trainmen. The work in the yard is continuous; and, as no man can work continuously, it is done as a matter of course by men regularly hired from day to day, in twelve or eight hour shifts. It is likewise done at the same fixed place. The new shift come promptly to the yard from their nearby homes to relieve the old shift as they depart to theirs.

The train employee on the other hand is in a measure in the situation of a sailor voyaging on a ship; except that he has no place to sleep. On the run he can only with difficulty be replaced; and the temptation is great both to the employer to keep him, and to him to remain, on duty on the train until its allotted run, however protracted, is completed, and he can reach his temporary or permanent home at one or the other end of it.

For these reasons it is that probably in none of

all the prosecutions under the Hours of Service Act until the present will there be found an instance of yard men kept at work beyond their twelve or eight hour stunt. In their case there was and is no existing abuse for a statute to remedy. Of this Congress was better informed than the Court below or the petitioner's counsel; and it was for that reason that it saw fit not to bring them under the Hours of Service Act.

San Pedro Co. v. *U. S.*, 213 Fed. Rep. 386 (Circuit Court of Appeals, Eighth Circuit).

> *By the Court.*—"To promote the safety of employees and travellers upon railroads, the statute broadly contemplates the efficiency, as affected by reasonable opportunities for rest, of a class of men *not ordinarily hired from day to day*, but engaged in regular service in connection with the movement of trains, or subject to call for such service."

Last Point.

The judgment should be affirmed.

Respectfully submitted,

HENRY B. CLOSSON,
of Counsel for Defendant
Brooklyn Eastern District Terminal.

UNITED STATES *v.* BROOKLYN EASTERN DISTRICT TERMINAL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 155. Argued January 20, 1919.—Decided March 24, 1919.

Whether a carrier is a common carrier within the meaning of the Hours of Service Act, does not depend upon whether its charter declares it to be such, nor upon whether the State of incorporation so considers it, but upon what it does. P. 304.

The fact that a carrier acts only as agent for other carriers may affect its contractual obligations to shippers, but cannot change its obligations, under the Hours of Service Act, concerning the physical operation of its railroad, and the safety of its employees and the public which the act aims to secure. P. 306.

The act must be liberally construed. P. 307.

A navigation company, owner of a terminal consisting of docks, float bridges, warehouses, etc., with delivery and other tracks which crossed a public street and varied individually from a few yards to a mile in length and aggregated 8 miles, was engaged, under separate contracts with interstate railroads, in the reception and delivery there of freight, in carload lots and less (the terminal being named as a reception and delivery station in the tariffs filed by the railroads with the Interstate Commerce Commission), and in transporting the freight on floats between the terminal and the railroad termini, in cars furnished by the railroads, which it hauled between its floats and its reception and delivery tracks, etc., by means of its engines and crews. As agent of the respective railroads, it accepted all freight offered for their lines, issued bills of lading to destination for outgoing freight and receipts for freight delivered to consignees, collected the railroads' tariff charges, where they did not extend credit, adding nothing on its own account, and accounted to them in full. Its compensation, paid by the respective railroads, was determined by weight and origin or destination of goods handled. It owned no cars, and moved none save those mentioned, paid nothing for their use, and did not hold itself out as a common carrier or file tariffs with the Interstate Com-

merce Commission. *Held*, a common carrier within the meaning of the Hours of Service Act, c. 2939, 34 Stat. 1415. P. 304.

Crews engaged in moving at one time a locomotive and seven or eight cars between the docks and the warehouses and team tracks of a terminal company, *held* engaged in the movement of a "train," within the meaning of the Hours of Service Act, § 1. P. 307.

239 Fed. Rep. 287, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom *Mr. Neal L. Thompson* was on the brief, for the United States.

Mr. Henry B. Closson, for respondent, in support of the contention that the Terminal is not a common carrier,—because it is not organized and does not hold itself out as such, and because its relations are not with shippers or consignees, but only with the carriers with which it chooses to contract, and its obligations are wholly to the latter and not at all to the former—cited the following: *United States* v. *Ramsey*, 197 Fed. Rep. 144; *Jackson Iron Works* v. *Hurlbut*, 158 N. Y. 34, 38; *United States* v. *Union Pacific R. R. Co.*, 213 Fed. Rep. 332; *Texas & Pacific Ry. Co.* v. *Henson*, 56 Tex. Civ. App. 468; *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. R. Co.*, 37 Fed. Rep. 567, 615, 617; 6 Cyc. 366.

It is immaterial that the Terminal may be subject to the Interstate Commerce Act. It was because of the broad definitions of "railroad" (including terminal facilities), and "transportation," in that act, and because of provisions in the acts of their incorporation, and their control by railroads, that the terminals involved in the following cases were held subject to the Interstate Commerce Act or the Employers' Liability Act. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*,

219 U. S. 498; *United States* v. *Union Stock Yard*, 192 Fed. Rep. 330; 226 U. S. 286; *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, arose under a statute subjecting every "public utility" or "common carrier" to the orders of a commission, and declaring that the phrase "common carrier" should be held to include "every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." This court held that the Taxicab Company was an agency for public use for the conveyance of persons within the District. The decision throws no light upon the question here whether the Brooklyn Eastern District Terminal is a common carrier "in the usual and ordinary acceptation of the term." *United States* v. *Ramsey*, *supra*.

For similar reasons, decisions sustaining prosecutions against transportation corporations for violation of the provisions of the Safety Appliance Act requiring the use of automatic couplers, grab-irons and draw-bars cannot properly be cited as decisions that the corporations in question were "common carriers," for these provisions relating to cars apply to all cars "used on any railroad engaged in interstate commerce." Amendment of March 2, 1903; *Belt Ry. Co.* v. *United States*, 168 Fed. Rep. 542; *United States* v. *Union Stockyard & Transit Co.*, 192 Fed. Rep. 330, 336; *United States* v. *Union Stockyards Co. of Omaha*, 161 Fed. Rep. 919; 169 Fed. Rep. 404; *Hines* v. *Stanley G. I. Co.*, 199 Massachusetts, 522.

The Terminal is not "engaged in the transportation of property by railroad"; and for that reason also is not subject to the Hours of Service Act. Merchandise in a car being shunted back and forth over its tracks is not being "transported by railroad." It is being made ready for transportation by water to the railroad or is being

delivered after such transportation. *Taggart* v. *Republic Iron & Steel Co.*, 141 Fed. Rep. 910.

The car floats in their daily movement between its station and the different railroad termini do not constitute "ferries used or operated in connection with any railroad," which the act declares the term "railroad" shall include. *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454, 467, 468.

The employees were not "actually engaged in or connected with the movement of any train." Aggregations of cars, however many, while in process of being switched in switching yards by switching locomotives, are not "trains"; to be such they must be proceeding on a journey from one point to another on the main line of the railroad. This distinction is made in the following: *United States* v. *Erie R. R. Co.*, 237 U. S. 402; *United States* v. *Chicago, Burlington & Quincy R. R. Co.*, 237 U. S. 410; *La Mere* v. *Railway Transfer Co.*, 125 Minnesota, 159; *United States* v. *Grand Trunk Ry. Co.*, 203 Fed. Rep. 775; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 198 Fed. Rep. 637; *United States* v. *Pere Marquette R. R. Co.*, 211 Fed. Rep. 220; *Clary* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 141 Wisconsin, 411; *Lynch* v. *Great Northern Ry. Co.*, 112 Minnesota, 382.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415) [1] prohibits any common carrier by railroad en-

[1] Act of March 4, 1907, c. 2939, 34 Stat. 1415.

"That the povisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad . . . from one State . . . to any other State. . . . The term 'railroad' as used in this Act shall include all bridges and ferries used or operated

gaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than sixteen consecutive hours. For alleged violation of this provision, proceedings were brought against the Brooklyn Eastern District Terminal in the District Court of the United States for the Eastern District of New York. The defendant contended that it was not a common carrier; that it was not engaged in interstate commerce by railroad; and that its employees were not "connected with the movement of any train." Upon facts which were agreed the trial court entered judgment for the Government. The Circuit Court of Appeals reversed the judgment on the ground that, while the Terminal was engaged in interstate commerce and the employment in question was connected with the movement of trains, it was not a common carrier. 239 Fed. Rep. 287. The case comes here on writ of certiorari (243 U. S. 647); and the substantial question before us is whether the Terminal is within the scope of the Hours of Service Act, as being a common carrier. The essential facts are these:

1. The Terminal is a navigation corporation with an authorized capital stock of one hundred thousand dollars ($100,000), incorporated under § 10 of Article III of the transportation corporations law of the State of New York, which reads as follows:

"Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating or

in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employees' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours . . ."

owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce or navigation upon the ocean, or any seas, sounds, lakes, rivers, canals or other waterways, and for the carriage, transportation or storing of lading, freight, mails, property or passengers thereon."

In its certificate of incorporation, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other property, to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. The Terminal operates a union freight station at Brooklyn under individual contracts with ten interstate railroads and several steamship companies. From the railroads it receives both carload and less-than-carload freight and transports the same from their termini to its Brooklyn docks. There, the cars containing such freight are hauled from the car floats by its locomotives and placed for unloading either on its team tracks or at its freight houses. The Terminal receives likewise from shippers both carload and less-than-carload outgoing freight originating at Brooklyn and consigned to points upon the various railroads with which it has contracts. The cars carrying this outgoing freight are then switched and loaded by its locomotives upon its floats and transported by its tugs to the docks of the several railroads.

3. For its services in handling freight as above set forth the Terminal is paid not by the shipper or consignee, but by the railroad or steamship company upon whose account the transportation service is performed, at the rate of 3 cents per 100 pounds of freight moving to or from points east of the western termini of said railroads, and 4 1-5 cents

per 100 pounds on freight moving to or from points beyond such termini. Upon prepaid shipments from shippers not on the credit lists of the railroads it collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place, when such charges have not been prepaid. The freight moneys and charges so received by the defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

4. The Terminal does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs, or copies of the contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. The terminal at Brooklyn is designated by such railroads and rail and water lines, in the tariffs filed by them with the Interstate Commerce Commission, as one of their receiving and delivering stations for freight in the Port of New York; and through bills of lading to such terminal as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn bills of lading of the railroad or steamship line to which the freight is to be delivered are there issued to the shipper by one of the defendant's employees, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

5. The tracks of the Terminal which extend from its float bridges to several warehouses, coal pockets, platforms, and team tracks have an aggregate length of 8-1/3 miles. One track connecting its several dock and delivery

tracks which is kept clear for operating its switching engines is about one mile in length. The length of haul effected by its locomotives in moving cars between its float bridges and warehouses, platforms, pockets, and team tracks varies from a few yards to nearly a mile. The number of cars so hauled as part of a movement varies from a single car to eight cars. As an incident to such movement its locomotives hauling cars cross a public street in Brooklyn.

6. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks. For the use of such cars defendant pays no charges; and except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

7. In connection with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer and two or more brakemen.

The Hours of Service Act declares (in the first section) that, "The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease." Hence, neither the character of the Terminal's railroad nor its independent ownership excludes it from the scope of the act. But the Terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to

it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

We need not undertake a definition of the term "common carrier" for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable "to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad," made its prohibitions applicable to the Terminal and its employees engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254.

The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306; 231 U. S. 274, 288. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their

nature; and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the ten railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the Hours of Service Law. The evils sought to be remedied exist equally, whether the terminal operations are conducted by the railroad companies themselves or by the Terminal as their agent; and whether the Terminal acts only as such agent for railroads or undertakes in addition to transport on its own account goods for shippers. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employees and the public.

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character;—that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States v. Sioux City Stock Yards Co.*, 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts,

Union Stockyards Co. of Omaha v. *United States*, 169 Fed. Rep. 404; *Belt Railway Co. of Chicago* v. *United States*, 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States* v. *Sioux City Stock Yards Co., supra.*[1]

What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid shipments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination; except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the consignees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease to be

[1] Compare also *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384, 394, *et seq.*; *State* v. *Union Stock Yards Co.*, 81 Nebraska, 67.

such merely because the services which it renders to the public are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. See *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which as this court has said, must be liberally construed to secure the safety of employees and the public. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 U. S. 336.

It is now admitted that the Terminal is engaged in interstate commerce; and it is clear that at least "switching crews" engaged in moving at one time a locomotive with seven or eight cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a "train." The decisions under the Safety Appliance Acts depend upon the particular context in which the word "train" there occurs, and are not here applicable. Compare *United States* v. *Erie R. R. Co.*, 237 U. S. 402, 407–408.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.